MISSISSIPPI CODE 1972

Annotated

Debtor-Creditor
Relationship
Contracts and Contractual
Relations
Real and Personal Property

Titles 85 to 89

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME NINETEEN B

DEBTOR-CREDITOR RELATIONSHIPS CONTRACTS AND CONTRACTUAL RELATIONS REAL AND PERSONAL PROPERTY

§§ 85-1-1 to 89-23-27

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2011 REGULAR LEGISLATIVE SESSION

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This new 2011 Volume 19B of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 Volume 19, the 1991 replacement Volume 19 and the 1999 Replacement Volume 19A, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2011 Regular Session.

This volume contains the full text of Titles 85 through 89, of the Mississippi Code of 1972 Annotated, as amended through the 2011 Regular Legislative Session.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates through August 17, 2010, and decisions of the appropriate federal courts with decision dates through May 27, 2010. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

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For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

August 2011 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Code Service
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— Amendment Notes
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— Attorney General Opinions
— Code Status
— Comparable Legislation from other States
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— Organization and Numbering System
— Placement of Notes
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— Source Notes
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are available online from 1991 until the present in the Mississippi Legislative Archive.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States.*

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. :

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
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- Consolidated Tables of amendments and repeals of 1942 Code sections.
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TITLE 85

DEBTOR-CREDITOR RELATIONSHIP

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CHAPTER 1

Assignment for Benefit of Creditors

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§ 85-1-1. Execution of assignment; petition in chancery in case of general assignment.

Assignments for the benefit of creditors may be executed as heretofore; but in every case of a general assignment where the property assigned shall exceed in value the sum of One Thousand Dollars ($1,000.00), the assignee or trustee shall, before he enters upon the discharge of his duties, after taking possession, and within twenty-four (24) hours thereafter, file a petition in the chancery court of the county of the assignor's residence or place of business, or if he had no residence or place of business in this state, then of the county of the residence of some of his creditors, or where the property or some of it may be, for the administration of the trust. The assignor and all of his creditors must be made parties to the petition.

SOURCES: Codes, 1892, § 117; 1906, § 120; Hemingway's 1917, § 107; 1930, § 110; 1942, § 298.

Cross References — Definition of "insolvency proceeding" under Uniform Commercial Code as including assignment for benefit of creditors, see § 75-1-201.

Definition of "lien creditor" under Uniform Commercial Code-Secured Transaction as including assignee for benefit of creditors, see § 75-9-301.

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12. Fees, expenses and costs.

1. In general.

Notes and solvent credits of an insolvent bank which passed to an assignee by a general assignment before February 1 in any year are taxable in the hands of the assignee and he should render them to the assessor. Gerard v. Duncan, 84 Miss. 731, 36 So. 1034 (1904).

One making a general assignment for the benefit of his creditors, must, in good faith, devote the whole of his nonexempt property to the payment of his debts, parting absolutely with all control over the same, and must reserve no benefit to himself, and retain no power or control over the property. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

The assignee in a general assignment occupies a dual relation. Weems v. Love Mfg. Co., 74 Miss. 831, 21 So. 915 (1897).

It is only where the assignment is general that the assignor can petition the chancery court under this chapter; A petition by an assignee in a partial assignment should be dismissed. Lowenstein v. Hooker, 71 Miss. 102, 14 So. 531 (1893).

2. Transactions and transfers creating assignment.

Deeds to real property with separate instrument stating deeds were to secure payment of money did not constitute "assignment for benefit of creditors." Stirling v. Logue, 154 Miss. 812, 123 So. 825 (1929).

It is immaterial that an assignment contained only personalty and that aiding deeds contained only land, where, in law, they constituted one instrument and one transaction. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

Whether a deed of trust to secure a creditor shall be treated as part of a general assignment made shortly afterward by the debtor is to be determined by the purpose of the creditor in making the former. Pollock v. Sykes, 74 Miss. 700, 21 So. 780 (1897).

Sale of goods, transfer of collaterals and the execution of a deed of trust to a creditor bank, and the assignment for benefit of creditors shortly thereafter, by an insolvent corporation, did not form a general assignment for the benefit of creditors where they were separate and independent transactions. Sells v. Rosedale Grocery & Comm'n Co., 72 Miss. 590, 17 So. 236 (1895).

The dismissal of the petition of the assignee in a partial assignment carries with it a cross-petition filed by creditors. Lowenstein v. Hooker, 71 Miss. 102, 14 So. 531 (1893).

A conveyance by an officer (state treasurer) to indemnify the sureties on his official bond against loss by defalcation, though embracing all the grantor's property, is not an assignment subject to the strict rules governing such instruments but is a mortgage enforceable upon the contingency of liability and dependent upon future developments. State v. Hemingway, 69 Miss. 491, 10 So. 575 (1891).

3. —Partial assignments.

A partial assignment is not invalidated by the fact that shortly before its execution the assignor had fraudulently converted a part of his assets into money. Thompson v. Preston, 73 Miss. 587, 19 So. 347 (1896).

The omission of a substantial part of the assignor's property makes it a partial assignment and preferences thereby created are not void for noncompliance with the statute relating to general assignments. Newman v. Black, 73 Miss. 239, 18 So. 543 (1895).

While an assignment purporting to convey only specific property must be treated as a partial assignment until the contrary be shown, yet if it does in fact convey all of the assignee's property liable for his debts, it will be dealt with as a general assignment regardless of its terms. Newman v. Black, 73 Miss. 239, 18 So. 543 (1895).

Debtor's assignment of part of estate for benefit of certain creditors and conveyance of remainder of its property to another creditor held not a general assignment. Starling & Smith Co. v. Flash, 16 So. 875 (Miss. 1894).

This section [Code 1942, § 298] is not applicable to partial assessments but applies only to general assignments. Lowenstein v. Hooker, 71 Miss. 102, 14 So. 531 (1893).

A partial assignment acts only on the property embraced in it. Hence an assignment which without purporting to embrace all the assignor's property conveys his stock of merchandise in a designated store, together with the notes and books of account pertaining thereto, is partial regardless of what the grantor thought or intended. Jones v. McQueen, 71 Miss. 98, 14 So. 146 (1893).

Whether an assignment is general or partial is to be determined by its terms. Jones v. McQueen, 71 Miss. 98, 14 So. 146 (1893).

4. Effect of assignment on rights and remedies of creditors generally.

A general assignment does not defeat a landlord's rights but he must apply to the chancery court for the payment of his rent out of the proceeds of the assigned property. Rice v. Harris, 76 Miss. 422, 24 So. 880 (1899).

No jurisdiction over property is acquired by chancery court until petition of assignee is filed and bond approved, and until then creditors may attach the same in the hands of the assignee. Weimer v. Scales, 74 Miss. 1, 19 So. 588 (1896).

However, the landlord suing out an attachment cannot make an actual levy. By application to the chancery court he may proceed against the property or its proceeds. Paine v. Sykes, 72 Miss. 351, 16 So. 903 (1894).

The assignment as written is the law for the administration of the insolvent's estate; neither the assignee nor the courts may add to or subtract therefrom and as written it must be susceptible of complete execution without depriving creditors of their legal rights or it may not stand against their attack. Rothenberg v. Bradley, 69 Miss. 1, 10 So. 922 (1891); Selleck v. Pollock, 69 Miss. 870, 13 So. 248 (1892); Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895).

An assignee is not a bona fide purchaser and therefore goods assigned to him which are liable to be attached for rent, may be still subjected to the landlord's demand. Paine v. Aberdeen Hotel Co., 60 Miss. 360 (1882); Paine v. Sykes, 72 Miss. 351, 16 So. 903 (1894).

5. Validity of assignments generally.

The failure to file schedules as provided by Code 1942, § 306 does not affect the general assignment where no preferences are made. Kaufman v. Simon, 80 Miss. 189, 31 So. 713 (1902).

The only penalty inflicted by the law upon one who executes or procures the execution to him of a fraudulent assignment is the loss of the benefits of the instrument. Weems v. Love Mfg. Co., 74 Miss. 831, 21 So. 915 (1897).

A subsequent composition agreement and the dealings of the parties thereunder cannot be considered in determining the validity of an assignment, and a deed in aid thereof. Allen v. Union & Planters' Bank, 72 Miss. 549, 17 So. 442 (1895); English v. Friedman, 70 Miss. 457, 12 So. 252 (1892).

In the absence of exceptional circumstances, one partner cannot, without the consent of his copartner, make a general assignment for the benefit of creditors, and being prima facie invalid, the burden of proof to show consent of the other partner is upon those who would maintain it. Mayer v. Bernstein, 69 Miss. 17, 12 So. 257 (1891).

Subsequent ratification by the nonexecuting partner will not affect the liens of creditors who have assailed it. Mayer v. Bernstein, 69 Miss. 17, 12 So. 257 (1891).

A voluntary assignment by an insolvent partnership which devotes partnership assets to the payment of individual debts of a partner is fradulent and void as to firm creditors. Marks, Rothenberg & Co. v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

The intent which will void a voluntary assignment need not be an actual corrupt intent; where the thing done is unlawful and naturally results in hindering, delaying, or defrauding creditors, the law imputes a fraudulent intent and this is so whether the unlawful thing is shown by extrinsic evidence or appears on the face of the deed. Marks, Rothenberg & Co. v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

6. Preferences.

Debtor may make assignment preferring general creditors. Bradberry v. Adams, 110 Miss. 581, 70 So. 697 (1916).

The tendency is to recognize the view that preferences were allowed at common law and that the principles of an insolvent or bankrupt law are not applicable to the making of general assignments. Pollock v. Sykes, 74 Miss. 700, 21 So. 780 (1897).

While an insolvent corporation may in good faith prefer creditors, yet the directors cannot prefer themselves. Love Mfg. Co. v. Queen City Mfg. Co., 74 Miss. 290, 20 So. 146 (1896).

The omission of a substantial part of the assignor's property makes it a partial assignment and preferences thereby created are not void for noncompliance with the statute in relation to general assignments. Newman v. Black, 73 Miss. 239, 18 So. 543 (1895).

An assignment stating the debt of a preferred creditor somewhat in excess of the amount due him, is not thereby invalidated where it authorizes the assignee to correct the schedule of liabilities if by inadvertence there was a mistake or error in the amounts thereof. Goodbar Shoe Co. v. Montgomery, 73 Miss. 73, 19 So. 196 (1895); H. Wetler Mfg. Co. v. Dinkins, 70 Miss. 835, 12 So. 584 (1893), adhered to, 70 Miss. 839, 13 So. 226 (1893); Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895).

Where formal insolvency proceedings are waived and by consent a decree is entered directing the administrator of an insolvent decedent's estate to make distribution among creditors, he becomes personally liable for the amounts decreed to them respectively and may prefer such a creditor in a partial assignment of his property. Allen v. Smith Bros. Co., 72 Miss. 689, 18 So. 579 (1895); Anderson v. Tindall, 26 Miss. 332 (1853).

Where a usurious debt is intentionally preferred, such preference is unlawful and avoids the assignment. Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); H. Wetler Mfg. Co. v. Dinkins, 70 Miss. 835, 12 So. 584 (1893), adhered to, 70 Miss. 839, 13 So. 226 (1893).

A release from personal liability given the assignor by a preferred creditor for a usurious debt, will not make the assignee, who had notice of the usury, a bona fide purchaser for the protection of such preference. Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); H. Wetler Mfg. Co. v. Dinkins, 70 Miss. 835, 12 So. 584 (1893), adhered to, 70 Miss. 839, 13 So. 226 (1893).

Knowledge by the assignee of the unlawful act of the assignor will avoid it although the preferred creditor has paid value. Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); H. Wetler Mfg. Co. v. Dinkins, 70 Miss. 835, 12 So. 584 (1893), adhered to, 70 Miss. 839, 13 So. 226 (1893).

An insolvent corporation or individual may prefer creditors by mortgage, sale or assignment in cases untainted by fraud. Sells v. Rosedale Grocery & Comm'n Co., 72 Miss. 590, 17 So. 236 (1895).

An assignment is not invalid because it prefers a fee to attorneys "for services and advice in and about this assignment and for the execution of this trust," since in these matters necessary counsel fees are allowable. Memphis Grocery Co. v. Leach, 71 Miss. 959, 15 So. 113 (1894).

An assignment preferring a creditor whose debt embraces usury is not invalid if the amount directed to be paid does not exceed the principal and legal interest; the assignor may waive his personal privilege of defeating all interest. H. Wetler Mfg. Co. v. Dinkins, 70 Miss. 835, 12 So. 584 (1893), adhered to, 70 Miss. 839, 13 So. 226 (1893).

But a general assignment directing payment to a particular attorney of a fixed sum as a fee not alone for drawing the assignment but also for services thereafter to be rendered in maintaining it if assailed and that whether the services are required or not, is fraudulent and void. Selleck v. Pollock, 69 Miss. 870, 13 So. 248 (1892).

Where one partner buys the interest of another giving his note therefor and afterward fails and makes an assignment he may prefer this debt and also a debt for money loaned him by the retiring partner after his withdrawal, notwithstanding there was no notice of the withdrawal of the retiring partner and that by reason thereof he might be personally liable for debts subsequently contracted. Richardson v. Davis, 70 Miss. 219, 11 So. 790 (1892).

A preference in favor of the tax collector for taxes on lands owned by the partners individually will avoid the assignment by an insolvent partnership. Marks, Rothenberg & Co. v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

The preference of a fictitious debt makes the assignment void as to creditors, although the grantor through mistake of law supposed he owed the debt. Whether this would be so if a debt not really due were unintentionally preferred through honest mistake of fact is not decided. Marks, Rothenberg & Co. v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

7. Reservations and retention of property.

An assignment conveying lands, tenements and "hereditaments" passes to the assignee by the use of the word "hereditaments" the right of the rents and the retention by the assignor of the rent notes and the subsequent delivery of them to a third person, being wholly ineffectual to defeat the assignee's right to the rents, will not invalidate the assignment. Allen v. Smith Bros. Co., 72 Miss. 689, 18 So. 579 (1895); Hatch v. Sykes, 64 Miss. 307, 1 So. 248 (1886); Kessee v. Sloan, 69 Miss. 369, 11 So. 631 (1891).

Retention of a part of the property assigned under the facts stated held to avoid the assignment. Mahorner v. Forcheimer, 73 Miss. 302, 18 So. 570 (1895).

If an assignor in good faith includes in a general assignment all of his known estate, it cannot be avoided because it afterward appears that he owned land not included in it, of which he knew nothing. Nor will his subsequent bad faith with regard to such land avoid it. English v. Friedman, 70 Miss. 457, 12 So. 252 (1892).

A general voluntary assignment by an insolvent debtor is void as to creditors if he reserves of the assets for his own benefit $100, notwithstanding the assets be of great value and the sum withheld be to meet pressing family necessities. Montgomery v. Goodbar, 69 Miss. 333, 13 So. 624 (1891); Rothenberg v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

A general assignment is not objectionable because it reserves to the assignor the right, with the assent of a majority of the creditors, to appoint another assignee if the one named declines the trust. Smith v. Bowdre, 69 Miss. 692, 13 So. 829 (1891).

The reservation by a partner of money which legally belongs to the firm, and which in general terms the assignment purports to convey, will void the assignment. Marks, Rothenberg & Co. v. Bradley, 69 Miss. 1, 10 So. 922 (1891).

8. Compositions with creditors.

Where composition agreement between assignors and their creditors provided for redelivery of personalty to assignors but expressly provided for retention of title to realty for the benefit of creditors, the agreement revoked the assignment as to the personalty but did not affect the assignment of the realty. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

Fact that composition agreement between assignors and their creditors modified the assignment and provided that the assignors, through the trustee, should have the power to sell or mortgage the realty conveyed for the benefit of creditors, did not render the assignment void, since it merely constituted the assignors, on account of their perfect knowledge of the lands involved, agents of the assignee. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

An extension of time allowed the trustee in which to carry out the liquidation of property assigned for the benefit of creditors of a co-partnership, provided for in a composition agreement of the partnership creditors, did not render the assignment void as to a creditor of one of the partners, where such extension was reasonable and incidental and necessary to the proper execution of the trust. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

A subsequent composition agreement and the dealings of the parties thereunder cannot be considered in determining the validity of an assignment, and a deed in aid thereof. English v. Friedman, 70 Miss. 457, 12 So. 252 (1892).

9. Priorities.

Mortgagee held entitled to enforce mortgage against assigned property though description void and mortgage not recordable. Sayers & Scovill Co. v. Doak, 127 Miss. 216, 89 So. 917 (1921).

Creditors filing a cross-petition where the assignment is adjudged void, are entitled to priority of payment out of the proceeds of the assigned property. The residue should be ratably distributed among all other creditors including those preferred. Creditors who have not attacked the assignment itself, but merely sought to defeat the preferences made under it, are not entitled to priority over the preferred creditors. Mahorner v. Forcheimer, 73 Miss. 302, 18 So. 570 (1895).

10. Jurisdiction of court.

The court acquires no jurisdiction over the property assigned until the assignee has filed a petition and his bond has been approved and until then creditors may attack the same in the hands of the assignee. Weimer v. Scales, 74 Miss. 1, 19 So. 588 (1896).

Filing the assignment for record in the office of the clerk of the chancery court does not vest the court with jurisdiction over the property. Weimer v. Scales, 74 Miss. 1, 19 So. 588 (1896).

Where the court acquires jurisdiction it draws to it the determination of all controversies in which liens are asserted, including attachments levied thereon. Weimer v. Scales, 74 Miss. 1, 19 So. 588 (1896).

11. Sale or disposition of assets.

In a nonpreferential assignment providing for the payment of liabilities ratably a creditor who holds collateral security is not entitled to dividends upon the face of his claim without crediting the value of the collateral. Union & Planters' Bank v. Duncan, 84 Miss. 467, 36 So. 690 (1904).

An arrangement that the assignors in the negotiation of sales of property assigned for the benefit of creditors, because of their knowledge of the effects and their value, should act as agents of the assignee, is legal. Union & Planters' Bank v. Allen, 77 Miss. 442, 27 So. 631 (1900).

Where previous attachments have been levied, a sale of the property by the assignee-receiver should be made free from the lien of the attachments, and the proceeds should be applied by the court to the payment of the attaching creditors. Weems v. Love Mfg. Co., 74 Miss. 831, 21 So. 915 (1897).

12. Fees, expenses and costs.

Under the facts stated an assignment was held to be general and an attorney was held entitled to have the funds charged with a reasonable fee for his services. Tishomingo Sav. Inst. v. Allen, 76 Miss. 114, 23 So. 305 (1898).

Where an assignment is made after the rendition and enrollment of a judgment against the assignor, the assignee is not entitled as against the judgment creditor to withhold fees, costs, and commissions incurred in resisting his demand out of the proceeds of the assigned property. Pittman v. Hopkins, 74 Miss. 563, 21 So. 606 (1897).

The assignee in a general assignment, acting as receiver, should be allowed counsel fees incurred in successfully defending the assignment or preserving the assigned property but not fees incurred in an unsuccessful defense of the assignment whether it be held void for actual fraud or for merely failing to comply with the statutory requirements. Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 So. 171 (1894); Kelly v. Davis, 37 Miss. 76 (1859).

There is no impropriety in counsel for the receiver also representing creditors who are preferred in the assignment and seeking to uphold it. Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 So. 171 (1894).

The assignee-receiver is not bound to defend an assignment at his own expense but he should give notice to creditors interested to defend or secure indemnity from them against expenses necessary in the defense. Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 So. 171 (1894).

An assignment is not invalid because it prefers a fee to attorneys "for services and advice in and about this assignment and for the execution of this trust," since in these matters necessary counsel fees are allowable. Memphis Grocery Co. v. Leach, 71 Miss. 959, 15 So. 113 (1894).

The assignee may be allowed a gross sum for his entire services as receiver and manager. Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 So. 171 (1894); Lichtenstein v. Dial, 68 Miss. 54, 8 So. 272 (1890).

But a general assignment directing payment to a particular attorney of a fixed sum as a fee not alone for drawing the assignment but also for services thereafter to be rendered in maintaining it if assailed and that whether the services are required or not, is fradulent and void. Taggert v. Muse, 60 Miss. 870 (1883).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 1 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Assignments for Benefit of Creditors, Form 1 (petition or application for court order assuming jurisdiction of assignor's estate, confirming designation of trustee or assignee, appointing counsel, and providing for administration of estate).

2A Am. Jur. Pl & Pr Forms (Rev), Assignments for Benefit of Creditors, Form 1.1 (answer-defense-assignment not made by proper party).

2A Am. Jur. Pl & Pr Forms (Rev), Assignments for Benefit of Creditors, Form 2 (order assuming jurisdiction of assignor's estate, confirming designation of trustee or assignee, appointing counsel, and authorizing public or private sale of assets).

2B Am. Jur. Legal Forms 2d, Assignments, §§ 26:11 et seq. (general assignments).

Law Reviews. Dowd, Allowing Current Debtors to Retain Collateral without Reaffirming or Redeeming: A Healthy Balance Between Creditor and Debtor Rights. 17 Miss. C. L. Rev. 131, Fall, 1996.

The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 85-1-3. Schedules of liabilities and assets to be filed.

With every general assignment there shall be filed, unless the data all appear on its face, at least two (2) schedules. One of them, a schedule of liabilities, must set forth, so far as known to the assignor:

(a) The name of each of his creditors;

(b) The post-office address of each of them;

(c) The sum due each;

(d) How each debt is evidenced;

(e) The amount of interest each debt bears, and if in any way the debt is usurious, the facts must be stated;

(f) The consideration for each debt; and in case of renewals the history of the transaction must be traced to the original consideration; and

(g) What security, if any, each creditor has.

The other, a schedule of assets, must describe the property conveyed, and give its location and value. Both schedules-and if the data be in the face of the deed, then the assignment-must be under the oath of the assignor avowing the truthfulness of the matters of fact stated. A general assignment which does not comply with this section shall be void as to all preferences contained in it.

SOURCES: Codes, 1892, § 124; 1906, § 128; Hemingway's 1917, § 115; 1930, § 118; 1942, § 306.

JUDICIAL DECISIONS

1. In general.

Deeds to real property with separate instrument stating deeds were to secure payment of money did not constitute "assignment for benefit of creditors." Stirling v. Logue, 154 Miss. 812, 123 So. 825 (1929).

Failure to file schedules as provided herein does not affect a general assignment containing no preferences. Kaufman v. Simon, 80 Miss. 189, 31 So. 713 (1902).

A substantial compliance is sufficient as where the assignment and schedules together indicate the assets and liabilities so as to give full information as to both. Memphis Grocery Co. v. Leach, 71 Miss. 959, 15 So. 113 (1894).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 29, 30.

2B Am. Jur. Legal Forms 2d, Assignments for Benefit of Creditors §§ 26:44, 26:45. (schedules and inventories).

CJS. 6A C.J.S., Assignments § 63.

§ 85-1-5. Bond of assignee or trustee.

The assignee or trustee must file a bond with his petition, to be approved by the clerk, in a penalty equal to the value of all the property assigned and Two Hundred and Fifty Dollars ($250.00) additional, payable to the state, with at least two (2) sufficient sureties, conditioned for the faithful administration of his trust. Any judgment or decree that may be rendered in said cause or proceeding against the principal in the bond may be rendered against the sureties therein.

SOURCES: Codes, 1892, § 118; 1906, § 121; Hemingway's 1917, § 108; 1930, § 111; 1942, § 299.

JUDICIAL DECISIONS

1. In general.

Bond of assignee cannot be reduced. United States Fid. & Guar. Co. v. Felder, 105 Miss. 283, 62 So. 236 (1913).

No jurisdiction over property is acquired by chancery court until petition of assignee is filed and bond approved, and until then creditors may attach the same in the hands of the assignee. Weimer v. Scales, 74 Miss. 1, 19 So. 588 (1896).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors § 104.

CJS. 6A C.J.S., Assignments § 103.

§ 85-1-7. Assignee to become receiver of the court.

The assignee, upon filing the petition and the approval of his bond, shall become a receiver of the court, and shall be entitled to all the rights and privileges, and subject to all the duties and obligations, of other receivers in equity, and may be removed as such as in other cases, and shall not be sued in any other court save by permission of the court, or chancellor in vacation.

SOURCES: Codes, 1892, § 119; 1906, § 122; Hemingway's 1917, § 109; 1930, § 112; 1942, § 300.

Cross References — Appointment of receivers, see §§ 11-5-151 et seq.

JUDICIAL DECISIONS

1. In general.

Assignee's duty to represent interest of creditors in suit questioning validity of assignment. United States Fid. & Guar. Co. v. Jefferson Davis County, 114 Miss. 474, 75 So. 247 (1917).

Assignee will not cease to be assignee for benefit of creditors, although assignment be declared void. United States Fid. & Guar. Co. v. Jefferson Davis County, 114 Miss. 474, 75 So. 247 (1917).

Assignee held to have right to possession of goods superior to lien for purchase money. Goodbar & Co. v. Knight, 89 Miss. 124, 42 So. 539 (1907).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 88, 123-132.

CJS. 6A C.J.S., Assignments §§ 104 et seq.

§ 85-1-9. Inventories.

The assignee shall, as speedily as may be, and within ten (10) days after the filing of his petition, unless the court or the chancellor in vacation, shall, for cause, extend the time, prepare and file in the cause a complete and perfect inventory of the property and effects assigned. If, after making the first inventory, any other property or effects conveyed by the deed of assignment shall come to the possession or knowledge of the assignee, he shall make a supplemental inventory thereof speedily, and within ten (10) days thereafter, unless the time therefor shall be extended as provided in the case of the original inventory.

SOURCES: Codes, 1892, § 120; 1906, § 123; Hemingway's 1917, § 110; 1930, § 113; 1942, § 301.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors § 100.

2B Am. Jur. Legal Forms 2d, Assignments for Benefit of Creditors §§ 26:44, 26:45 (schedules and inventories).

CJS. 6A C.J.S., Assignments § 63.

§ 85-1-11. Creditor's cross-petition to set aside assignment.

Any creditor may file in said cause a cross-petition against the receiver, and he may make the assignor or other persons, whether parties to the suit before that time or not, defendants thereto, and show to the court that the assignment is fraudulent, or ought not, for any other reasons, to be enforced; and property other than that in the trustee's or assignee's hands may be shown to be liable for the debts of the assignor.

SOURCES: Codes, 1892, § 121; 1906, § 124; Hemingway's 1917, § 111; 1930, § 114; 1942, § 302.

JUDICIAL DECISIONS

1. In general.
2. Grounds of attack.
3. Pleadings.

1. In general.

A petition under a partial assignment will be dismissed as only the assignee in a general assignment can petition to have a trust administered; A cross-petition by the creditors falls with the dismissal of the assignee's petition. Lowenstein v. Hooker, 71 Miss. 102, 14 So. 531 (1893).

2. Grounds of attack.

Provision in assignment for allowance of attorney's fees by chancery court held not to create a preference. Dodwell v. Rieves, 114 Miss. 4, 74 So. 770 (1916).

General assignment by directors of bank without stockholders' consent held valid. Dodwell v. Rieves, 114 Miss. 4, 74 So. 770 (1916).

An assignment for the benefit of its creditors executed under an exigency, requiring prompt action by a corporation acting through a legal quorum of its directors in pursuance of directions from the stockholders at a meeting in which a majority of the stock and stockholders were represented, is not void or voidable at the suit of creditors, none of the stockholders objecting thereto because prompt notice was not given of the meetings. State Nat'l Bank v. Duncan, 83 Miss. 610, 35 So. 569 (1904).

A creditor cannot for the first time on appeal urge that the preferences in the assignment made by his debtor for the benefit of all creditors should be declared void for the failure of the debtor to file a proper schedule of his assets. Lowenstein v. Leach, 16 So. 493 (Miss. 1895).

3. Pleadings.

Not error to compel parties filing doubtful pleading to elect whether to treat it as cross-petition or original bill in equity. Metcalfe v. Merchants' & Planters' Bank, 89 Miss. 649, 41 So. 377 (1906).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors § 106.

2A Am. Jur. Pl & Pr Forms (Rev), Assignment for Benefit of Creditors, Forms 111 et seq.

§ 85-1-13. Creditor's cross-petition to set aside assignment; rights of successful creditor.

The creditor filing a cross-petition, if he succeed in establishing that the assignment ought not to be enforced, shall have priority over all other creditors in the distribution of the proceeds of the property in the assignee's hands, and a lien, from the filing of his cross-petition, on other property he may seek to have subjected to his debt; and in aid of such lien, a writ of sequestration, injunction, or other remedial process may issue.

SOURCES: Codes, 1892, § 121; 1906, § 124; Hemingway's 1917, § 111; 1930, § 114; 1942, § 302.

Cross References — Affidavit for attachment, see § 11-33-9.

Priority of unemployment compensation contributions during distribution of employer's assets pursuant to assignment for benefit of creditors, see § 71-5-377.

JUDICIAL DECISIONS

1. In general.

Creditors who unsuccessfully attack a general assignment by a corporation on the sole ground that it had not been duly executed are not thereby precluded from participating in the distribution of the assets. Duncan v. State Nat'l Bank, 85 Miss. 681, 38 So. 45 (1905).

Creditors filing a cross-petition and establishing their debts are entitled to a personal decree against the assignor even if they fail to vacate the assignment. Pollock v. Sykes, 74 Miss. 700, 21 So. 780 (1897).

Creditors who, by cross-petition, successfully assail an assignment, are entitled to priority; those who do not assail the assignment but merely the preferences, are not entitled to priority over preferred creditors but share with them in the distribution of the residue. Mahorner v. Forcheimer, 73 Miss. 302, 18 So. 570 (1895).

RESEARCH REFERENCES

Am Jur. 2A Am. Jur. Pl & Pr Forms (Rev), Assignment for Benefit of Creditors, Forms 111 et seq.

§ 85-1-15. Creditor's cross-petition to set aside assignment; rights of unsuccessful creditor.

Whenever a creditor may seek to set aside the assignment for any reason as provided in this chapter, and fail to do so, he shall nevertheless receive the share provided for him according to the terms of the instrument, first, however, deducting therefrom all the court costs, reasonable attorneys' fees, and other necessary expenses incurred by the assignee in defending the suit.

SOURCES: Codes, 1906, § 125; Hemingway's 1917, § 112; 1930, § 115; 1942, § 303.

RESEARCH REFERENCES

ALR. Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 106 et seq.

2A Am. Jur. Pl & Pr Forms (Rev), Assignment for Benefit of Creditors, Forms 111 et seq.

§ 85-1-17. Personal decree against assignor.

A creditor may demand, by cross-petition, a personal decree against the assignor for the amount of his debt; but priority of such personal decrees shall not affect the distribution of the assigned effects, or the proceeds thereof.

SOURCES: Codes, 1892, § 122; 1906, § 126; Hemingway's 1917, § 113; 1930, § 116; 1942, § 304.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 106 et seq.

§ 85-1-19. Duty of creditors to establish claims.

It shall be the duty of all creditors to establish their claims in said cause to the satisfaction of the court; and any creditor may oppose and controvert the demand or claim, in whole or in part, of any other person; and the court shall, on motion, cause all proper issues to be made up to test the validity of claims.

SOURCES: Codes, 1892, § 123; 1906, § 127; Hemingway's 1917, § 114; 1930, § 117; 1942, § 305.

JUDICIAL DECISIONS

1. In general.

The scheme of the chapter contemplates one proceeding in which assignee, assignor and all creditors are required to appear as parties and make good their demands. Mahorner v. Forcheimer, 73 Miss. 302, 18 So. 570 (1895).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments for Benefit of Creditors §§ 123, 124.

2A Am. Jur. Pl & Pr Forms (Rev), Assignments for Benefit of Creditors, Forms 41 et seq. (administration of estate).

CHAPTER 3

Exempt Property

Sec.
85-3-1. Property exempt from seizure under execution or attachment.
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85-3-49. Exempt property may be disposed of.
85-3-51. Exemptions allowed to residents only.
85-3-52. Judgment or claim of another state or political subdivision for failure to pay income tax on pension or retirement benefits.

§ 85-3-1. Property exempt from seizure under execution or attachment.

There shall be exempt from seizure under execution or attachment:

(a) Tangible personal property of the following kinds selected by the debtor, not exceeding Ten Thousand Dollars ($10,000.00) in cumulative value:

(i) Household goods, wearing apparel, books, animals or crops;
(ii) Motor vehicles;
(iii) Implements, professional books or tools of the trade;

(iv) Cash on hand;

(v) Professionally prescribed health aids;

(vi) Any items of tangible personal property worth less than Two Hundred Dollars ($200.00) each.

Household goods, as used in this paragraph (a), means clothing, furniture, appliances, one (1) radio and one (1) television, one (1) firearm, one (1) lawnmower, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the debtor and his dependents; however, works of art, electronic entertainment equipment (except one (1) television and one (1) radio), jewelry (other than wedding rings), and items acquired as antiques are not included within the scope of the term "household goods." This paragraph (a) shall not apply to distress warrants issued for collection of taxes due the state or to wages described in Section 85-3-4.

(b)(i) The proceeds of insurance on property, real and personal, exempt from execution or attachment, and the proceeds of the sale of such property.

(ii) Income from disability insurance.

(c) All property in this state, real, personal and mixed, for the satisfaction of a judgment or claim in favor of another state or political subdivision of another state for failure to pay that state's or that political subdivision's income tax on benefits received from a pension or other retirement plan. As used in this paragraph (c), "pension or other retirement plan" includes:

(i) An annuity, pension, or profit-sharing or stock bonus or similar plan established to provide retirement benefits for an officer or employee of a public or private employer or for a self-employed individual;

(ii) An annuity, pension, or military retirement pay plan or other retirement plan administered by the United States; and

(iii) An individual retirement account.

(d) One (1) mobile home, trailer, manufactured housing, or similar type dwelling owned and occupied as the primary residence by the debtor, not exceeding a value of Thirty Thousand Dollars ($30,000.00); in determining this value, existing encumbrances on the dwelling, including taxes and all other liens, shall first be deducted from the actual value of the dwelling. A debtor is not entitled to the exemption of a mobile home as personal property who claims a homestead exemption under Section 85-3-21, and the exemption shall not apply to collection of delinquent taxes under Sections 27-41-101 through 27-41-109.

(e) Assets held in, or monies payable to the participant or beneficiary from, whether vested or not, (i) a pension, profit-sharing, stock bonus or similar plan or contract established to provide retirement benefits for the participant or beneficiary and qualified under Section 401(a), 403(a), or 403(b) of the Internal Revenue Code (or corresponding provisions of any successor law), including a retirement plan for self-employed individuals qualified under one of such enumerated sections, (ii) an eligible deferred compensation plan described in Section 457(b) of the Internal Revenue Code (or corresponding provisions of any successor law), or (iii) an individual retirement account or an individual retirement annuity within the meaning of Section 408 of the Internal Revenue Code (or corresponding provisions of any successor law), including a simplified employee pension plan.

(f) Monies paid into or, to the extent payments out are applied to tuition or other qualified higher education expenses at eligible educational institutions, as defined in Section 529 of the Internal Revenue Code or corresponding provisions of any successor law, monies paid out of the assets of and the income from any validly existing qualified tuition program authorized under Section 529 of the Internal Revenue Code or corresponding provisions of any successor law, including, but not limited to, the Mississippi Prepaid Affordable College Tuition (MPACT) Program established under Sections 37-155-1 through 37-155-27 and the Mississippi Affordable College Savings (MACS) Program established under Sections 37-155-101 through 37-155-125.

(g) The assets of a health savings account, including any interest accrued thereon, established pursuant to a health savings account program as provided in the Health Savings Accounts Act (Sections 83-62-1 through 83-62-9).

(h) In addition to all other exemptions listed in this section, there shall be an additional exemption of property having a value of Fifty Thousand Dollars ($50,000.00) of whatever type, whether real, personal or mixed, tangible or intangible, including deposits of money, available to any Mississippi resident who is seventy (70) years of age or older.

(i) An amount not to exceed Five Thousand Dollars ($5,000.00) of earned income tax credit proceeds.

(j) An amount not to exceed Five Thousand Dollars ($5,000.00) of federal tax refund proceeds.

(k) An amount not to exceed Five Thousand Dollars ($5,000.00) of state tax refund proceeds.

(*l*) Nothing in this section shall in any way affect the rights or remedies of the holder or owner of a statutory lien or voluntary security interest.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 1 (23); 1857, ch. 61, art. 280; 1871, § 2131; 1880, § 1244; 1892, § 1963; 1906, § 2139; Hemingway's 1917, § 1812; 1930, § 1755; 1942, § 307; Laws, 1932, ch. 138; Laws, 1948, ch. 232, § 1; Laws, 1962, 1st Ex Sess. ch. 7; Laws, 1966, ch. 318, § 1; Laws, 1980, ch. 540, § 1; Laws, 1981, ch. 469, § 3; Laws, 1987, ch. 473; Laws, 1991, ch. 479, § 7; Laws, 1995, ch. 565, § 1; Laws, 2002, ch. 594, § 1; Laws, 2006, ch. 595, § 1; Laws, 2008, ch. 557, § 1, eff from and after July 1, 2008.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the fourth line of paragraph (d). The words "income tax on benefits received from a pension or other retirement plan so used in this paragraph" was changed to "income tax on benefits received from a pension or other retirement plan. As used in this paragraph". The Joint Committee ratified the correction at its June 3, 2003, meeting.

Editor's Note — Laws of 1981, ch. 469, § 6 provides as follows:

"SECTION 6. The provisions of this act shall apply only to attachment, execution or garnishment proceedings instituted on or after the effective date of this act [April 7, 1981], and shall not defeat, extinguish or render void any claim or defense existing with respect to attachment, execution or garnishment proceedings instituted prior to the effective date of this act."

Cross References — Cases in which attachment is remedy, see § 11-33-1.

What writ is to be served upon and what is bound by levy, see § 11-33-23.

Answer by person summoned as garnishee, see § 11-35-25.

Garnishee suggesting exemptions, see § 11-35-33.

Exemption of city employees retirement fund, see § 21-29-51.

Exemption of disability and relief fund for firemen and policemen, see § 21-29-257.

Exemption of public employees' retirement system funds, see § 25-11-129.

Exemptions from ad valorem taxation generally, see §§ 27-31-1 et seq.

Exemption of property from execution sale, see § 43-33-33.

Exemption of property of municipality, see § 43-35-25.

Exemption of employee trust plan, see § 71-1-43.

Exemption of unemployment compensation benefits, see § 71-5-539.

Fire insurance generally, see §§ 83-13-5 et seq.

Federal exemptions state residents prohibited from taking, see § 85-3-2.

Descent of exempt property, see §§ 91-1-19 et seq.

Federal Aspects — Employee Retirement Income Security Act of 1974, see 29 USCS §§ 1001 et seq.

Sections 401, 403, 408, and 457 of the Internal Revenue Code, referred to in (e), are codified at 26 USCS §§ 401, 403, 408, and 457.

Section 529 of the Internal Revenue Code, referred to in (f), is codified at 26 USCS § 529.

JUDICIAL DECISIONS

1. In general.
2. Exempt personal property generally.
3. Tools equipment, etc., of trade or profession.
4. Animals.
5. Wages.
6. Proceeds derived from personal property.
7. Selection of exempt personal property.
8. Waiver of exemption.

1. In general.

Bankruptcy debtor's exemption claims in his simplified employee pension-individual retirement accounts (SEP-IRA) extended only to amounts reasonably necessary for support of debtor as well as of any dependents. In re Henderson, 167 B.R. 67 (Bankr. N.D. Miss. 1993).

A debtor in Mississippi may utilize Section 522(f)(2) of the Bankruptcy Code to avoid a voluntary nonpurchase-money security interest that impairs an exemption to which the debtor would be entitled but for the exclusionary language of subsection (e) of this section. Barkley v. Tower Loan of Miss., Inc. (In re Kennedy), 139 B.R. 389 (Bankr. N.D. Miss. 1992).

Under the statute, the proceeds of a voluntary sale of a homestead are exempt under all circumstances, regardless of the vendor's continuing to be a householder, or his acquiring another homestead, or the intent with which he keeps the proceeds. Davis v. Lammons, 246 Miss. 624, 151 So. 2d 907 (1963).

Although an exemption is a personal privilege and as a general rule cannot be taken advantage of, except by the execution or attachment debtor, an exception is that his wife can make the claim for him. Reid v. Halpin, 185 Miss. 396, 188 So. 310 (1939).

Laws granting exemption from levy and sale under execution are construed liberally in favor of the exemptionist. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630 (1905); Dreyfus v. Barton, 98 Miss. 758, 54 So. 254 (1910).

The section [Code 1942, § 307] has no application to a surviving partner who is administering the partnership assets. Lance v. Calhoun, 85 Miss. 375, 37 So. 1014 (1905).

Legislature cannot increase exemption so as to render additional property exempt from liability for existing debts. Johnson v. Fletcher, 54 Miss. 628, 28 Am. R. 388 (1877).

2. Exempt personal property generally.

State exemption statute and 11 USCS § 522(f) must be applied together, thus, debtors seeking to avoid nonpurchase-money security interests under 11 USCS § 522(f)(B) in "household goods" under Miss. Code Ann. § 85-3-1(a)(vi) were limited to the definition of "household goods" in the Mississippi statute, such that for example, a debtor could avoid a lien on only one television, but Miss. Code Ann. § 85-3-1(a)(iv) did expand the number of items that could be eligible for judicial lien avoidance pursuant to 11 USCS § 522(f)(1)(A). In re McCoy, — Bankr. —, 2003 Bankr. LEXIS 374 (Bankr. N.D. Miss. Apr. 23, 2003).

As a result of the 1995 amendment limiting the range of personal property that may be exempted from seizure, a debtor is prohibited from claiming a mobile home as exempt personal property. Cobbins v. Henderson, 227 F.3d 302 (5th Cir. 2000).

Bank deposit or account was in nature of "intangible" personal property, which could not be exempted from garnishment under Mississippi statute authorizing debtor to claim exemption only in tangible personal property not exceeding $10,000 in value. Cartwright v. Deposit Guar. Nat'l Bank, 675 So. 2d 847 (Miss. 1996).

Household goods which would normally be exempt under this section from seizure in bankruptcy proceedings, are not protected from holder of nonpossessory, nonpurchase-money security interest in goods by virtue of this section or federal exemption provisions. In re Fox, 902 F.2d 411 (5th Cir. 1990).

Chapter 7 debtor could not avoid nonpossessory, nonpurchase money security interest in household goods; under exemption scheme, household goods which are subject to voluntary security interest are not subject to exemption. In re Eiland, 95 B.R. 41 (Bankr. N.D. Miss. 1988).

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. Levy v. T.R. Rosell & Co., 82 Miss. 527, 34 So. 321 (1903).

A possessory claim is sufficient to entitle a debtor to the exemption. Stein v. Hamblett, 66 Miss. 112, 5 So. 524 (1889).

Money due for damage to exempt property is not itself exempt. Johnson v. Edde, 58 Miss. 664 (1881).

3. Tools equipment, etc., of trade or profession.

A printing-press is not exempt as the tool of a mechanic. Frantz v. Dobson, 64 Miss. 631, 2 So. 75, 60 Am. R. 68 (1887).

A dentist is not a mechanic within the statute. Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579 (1856).

4. Animals.

Two horses used by business man in driving from home to place of business, in making pleasure trips with family, and occasionally making business trips, not work horses. Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 40 So. 9, 112 Am. St. R. 454, 6 Am. Ann. Cas. 776 (1906).

Statute (Acts 1875, p. 122) increasing exemption from one horse to two horses did not protect additional horse from liability to judgment enrolled before its passage. Johnson v. Fletcher, 54 Miss. 628, 28 Am. R. 388 (1877).

5. Wages.

The 1966 amendment to § 85-3-1(10)(a) required the garnishee to withhold funds from an employee's wages up until the return day of the writ or until the full amount of the judgment had been collected, whichever occurred first. Leasy v. Zollicoffer, 389 So. 2d 1378 (Miss. 1980).

In garnishment proceedings, where part of defendant's salary was exempt from garnishment because paid in advance in a larger amount than would, under statute exempting $50 a month, have been exempt if none of the salary had been paid in advance, remainder of such salary held not subject to statutory exemption. Peoples Bank v. Gore, 178 Miss. 216, 172 So. 506 (1937).

The exemption of a laborer's wages is conferred upon heads of families only. Lipp v. Genovese, 69 Misc. 357 (1910).

Money collected by an attorney on a claim due his client for wages exempt under this section [Code 1942, § 307] is not exempt from the attorney's lien. Halsell v. Turner, 84 Miss. 432, 36 So. 531 (1904).

Exemptions are highly favored by the law, and the protection may not be defeated by the intention or neglect of the garnishee; Hence, a garnishee who pays a judgment rendered against it as such, and as such takes an assignment of the judgment on which it is issued, remains liable to the judgment debtor where the debt garnished was exempt, as the monthly wages of the head of a family, and the garnishee fails to suggest the claim of exemption. City of Laurel v. Turner, 80 Miss. 530, 31 So. 965 (1902).

The price due a contractor for building a house, although he may do some unascertained portion of the work himself, is not wages within the meaning of this section [Code 1942, § 307]. Heard v. Crum, 73 Miss. 157, 18 So. 934, 55 Am. St. R. 520 (1895).

The exemption of the wages of a laborer, being the head of a family, was designed for the protection of the debtor's family and cannot be given a construction that would defeat its beneficent purpose. Hence, while the laborer being the head of a family and working for wages at eighty-one dollars per month, payable monthly, he is entitled to demand and receive his wages as they fall due monthly, notwithstanding the garnishment of his employer, and where such garnishment is returnable several months after the services thereof, neither the amount then due, when less than one hundred dollars, nor such other wages as the debtor may earn during the interval preceeding judgment under the same contract with garnishee, can be subjected by a writ of garnishment and the garnishee should be discharged. Chapman v. Berry, 73 Miss. 437, 18 So. 918, 55 Am. St. R. 546 (1895).

The exemption of the wages of a laborer, the head of a family, is not of one hundred dollars yearly or monthly, but exists as often as wages within the amount are sought to be subjected to legal process. Chandler v. White, 71 Miss. 161, 14 So. 454 (1893).

The exemption of wages due a laborer who is a citizen of the state, for work done here, cannot be defeated by garnishing the debtor, a railroad company in another state, it having a line of railroad there as well as in this state. Both debtor and creditor being residents of this state, the court will give effect to our exemption laws regardless of the laws of such other state. Illinois Cent. R.R. v. Smith, 70 Miss. 344, 12 So. 461, 35 Am. St. R. 651 (1893), overruled on other grounds, Southern P.R. Co. v. A.J. Lyon & Co. 54 So. 784 (Miss. 1911).

The "laborer" whose wages to the amount of one hundred dollars are exempt from garnishment, is one who subsists by physical toil in distinction from one who subsists by professional skill. Where physical toil is the main ingredient of services rendered, although directed and made more valuable by skill, the person performing it is a laborer within the meaning of the statute. Williams v. Link, 64 Miss. 641, 1 So. 907 (1887).

The statute denies to creditors the fruits of one's toil not exceeding one hundred dollars, that this compensation for labor may go to supply the wants of himself and family. Williams v. Link, 64 Miss. 641, 1 So. 907 (1887).

The wages of a laborer engaged as a clerk in a mercantile store, to the amount of one hundred dollars, are exempt from garnishment by virtue of the provision of this statute. Williams v. Link, 64 Miss. 641, 1 So. 907 (1887).

6. Proceeds derived from personal property.

The statute exempts the proceeds of the sale of exempt property, but in order to obtain such exemption, the proceeds must come from the sale of property which, at the time of sale, is actually a homestead meeting the requirements of the statute. Patterson v. Adams, 245 So. 2d 13 (Miss. 1971).

Where a husband and wife, having occupied certain property as their homestead, acquired new property, intending to live there permanently and make it their homestead, and moved to the new property, vacating the old homestead, the former homestead was not exempt from the claim of a creditor, and the proceeds of the sale of the former homestead which took place two weeks after the move to the new property, were not exempt. Patterson v. Adams, 245 So. 2d 13 (Miss. 1971).

Where the evidence established that the funds paid into court in a garnishment proceeding were for the purchase price of raw milk sold by the defendants to a dairy corporation, the defendants were not employees of the corporation and the funds were not for personal services, and consequently the tenth subsection of Code 1942 § 307 was inapplicable. Beam v. Greenville Mills, 215 So. 2d 253 (Miss. 1968).

Where debtor could claim exemption of specific articles sold under attachment, he is entitled to proceeds of articles in class bringing highest price. Anderson v. Dever, 109 Miss. 235, 68 So. 166 (1915).

Paragraph (b) of tenth clause of this section [Code 1942, § 307] is inapplicable where no sale of property and no attempt to subject proceeds of sale to creditor's debt. Bennett Bros. v. Dempsey, 94 Miss. 406, 48 So. 901, 136 Am. St. R. 581 (1909).

Money due for damage to exempt property is not itself exempt. Johnson v. Edde, 58 Miss. 664 (1881).

7. Selection of exempt personal property.

Exemptionist may select personal property of $250 in value out of any that he has, regardless of kind and character; could select truck worth less than $250 in lieu of property exempted by general provision. Hartfield v. Anderson, 156 Miss. 724, 126 So. 830 (1930).

The right of selection is not affected by the fraud of the debtor. Moseley v. Anderson, 40 Miss. 49 (1866).

8. Waiver of exemption.

Waiver of exemption in note is void. Teague v. Weeks, 89 Miss. 360, 42 So. 172 (1906).

ATTORNEY GENERAL OPINIONS

It is within the discretion of the levying officer to make a good faith determination as to what property would be considered exempt under this section. Hooks, April 5, 1996, A.G. Op. #96-0163.

RESEARCH REFERENCES

ALR. Interest of vendee under executory contract as subject to execution, judgment lien, or attachment. 1 A.L.R.2d 727.

Exemption of insurance proceeds as available to assignee of policy. 1 A.L.R.2d 1031.

Endowment policy as life insurance within exemption law. 30 A.L.R.2d 751.

Exemption of motor vehicle from seizure for debt. 37 A.L.R.2d 714.

Statutory provision that specified fund or property shall be "exempt from taxation," "exempt from any tax," or the like, as exempting such property from estate or succession taxes. 47 A.L.R.2d 999.

Value of room and board furnished to servant as included in total salary or earnings for purpose of statute exempting wages. 51 A.L.R.2d 947.

Wife as head of family within homestead or other property exemption provision. 67 A.L.R.2d 779.

Validity of contractual stipulation or provision waiving debtor's exemption. 94 A.L.R.2d 967.

Construction and effect of statutory exemptions of proceeds of workmen's compensation awards. 31 A.L.R.3d 532.

What is "necessary" furniture entitled to exemption from seizure for debt. 41 A.L.R.3d 607.

Choice of law as to exemption of property from execution. 100 A.L.R.3d 1235.

Search and seizure: what constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable-modern cases. 40 A.L.R.4th 381.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 A.L.R.5th 221.

Avoidance under 11 USCS § 522(f)(1) of the Bankruptcy Code of 1978 of judicial lien on debtor's exempt personal property. 47 A.L.R. Fed. 937.

Avoidance under 11 USCS § 552(f)(2) of the Bankruptcy Code of 1978 of nonpossessory, nonpurchase-money security interest in debtor's exempt personal property. 55 A.L.R. Fed. 353.

Individual retirement accounts as exempt property in bankruptcy. 133 A.L.R. Fed. 1.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 28 et seq.

Law Reviews. Montague, Are retirement funds exempt from the reach of creditors in Mississippi? 10 Miss. C. L. Rev 125, Spring, 1990.

Comment: ERISA and bankruptcy: can creditors reach a Chapter 7 debtor's pension?. 61 Miss. L. J. 389 (Fall 1991).

§ 85-3-2. Certain federal exemptions prohibited.

In accordance with the provisions of Section 522(b) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.S. 522(b)), residents of the State of Mississippi shall not be entitled to the federal exemptions provided in Section 522(d) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.S. 522(d)). Nothing in this section shall affect the exemptions given to individuals of Mississippi by the Constitution and statutes of the State of Mississippi.

SOURCES: Laws, 1991, ch. 614, § 1, eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

Through this section, the State of Mississippi has elected to "opt-out" of the federal exemptions scheme set forth in Section 522(d) of the Bankruptcy Code. Barkley v. Tower Loan of Miss., Inc. (In re Kennedy), 139 B.R. 389 (Bankr. N.D. Miss. 1992).

§ 85-3-3. Execution or attachment of personal property; selection of exempt property.

Where an officer shall be about to levy an execution or attachment on personal property, some of which shall be claimed as exempt, he shall demand of the defendant that he make selection of such property as is exempt to him and in reference to which he has the right of selection; and the defendant shall then and there make his selection, or, failing to do so, the officer shall make it for him, and any selection so made shall be conclusive on the defendant.

SOURCES: Codes, 1892, § 1966; 1906, § 2142; Hemingway's 1917, § 1817; 1930, § 1761; 1942, § 313.

Cross References — What writ is to be served on and what is bound by levy, see § 11-33-23.

JUDICIAL DECISIONS

1. In general.

General release of joint tortfeasor does not discharge liability of other joint tortfeasor who is neither party to release nor pays consideration for it, notwithstanding language in release releasing "all others whatsoever," where parol evidence undisputedly establishes intent to release only tortfeasor who is party to it. Smith v. Falke, 474 So. 2d 1044 (Miss. 1985).

Failure of wife to sign deed conveying all timber on all of grantor's land without reserving any exemption made deed void as to homestead. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

Under this section where, though defendant claimed the property to be exempt, the officer made no request that he make selection, and no notice was given to him to make it, defendant did not, by failing to select the property, forfeit his right to the exemption. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630 (1905).

A defendant whose property is levied upon under execution does not waive his right to claim his exemptions by asserting that the property belongs to his wife. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630 (1905).

ATTORNEY GENERAL OPINIONS

Under Section 85-3-3, when an officer is about to levy an execution or attachment, the officer should inform the defendant that he has a right to select certain personal property as exempt from execution. The officer should then demand that the defendant select such property that he wishes to claim as exempt. If the defendant refuses or fails to make a selection, the officer shall make the selection for him. Evans, April 26, 1996, A.G. Op. #96-0248.

RESEARCH REFERENCES

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 300, 301.

10 Am. Jur. Pl & Pr Forms (Rev), Exemptions, Forms 1 et seq. (notice, schedule, and selection).

§ 85-3-4. Execution or attachment of wages, salaries or other compensation; limitations.

(1) The wages, salaries or other compensation of laborers or employees, residents of this state, shall be exempt from seizure under attachment, execution or garnishment for a period of thirty (30) days from the date of service of any writ of attachment, execution or garnishment.

(2) After the passage of the period of thirty (30) days described in subsection (1) of this section, the maximum part of the aggregate disposable earnings (as defined by Section 1672(b) of Title 15, United States Code Annotated) of an individual that may be levied by attachment, execution or garnishment shall be:

(a) In the case of earnings for any workweek, the lesser amount of either,

(i) Twenty-five percent (25%) of his disposable earnings for that week, or

(ii) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage (prescribed by section 206 (a)(1) of Title 29, United States Code Annotated) in effect at the time the earnings are payable; or

(b) In the case of earnings for any period other than a week, the amount by which his disposable earnings exceed the following "multiple" of the federal minimum hourly wage which is equivalent in effect to that set forth in subparagraph (a)(ii) of this subsection (2): The number of workweeks, or fractions thereof multiplied by thirty (30) multiplied by the applicable federal minimum wage.

(3)(a) The restrictions of subsection (1) and (2) of this section do not apply in the case of:

(i) Any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by state law, which affords substantial due process, and which is subject to judicial review.

(ii) Any debt due for any state or local tax.

(b) Except as provided in subparagraph (b)(iii) of this subsection (3), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:

(i) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), fifty percent (50%) of such individual's disposable earnings for that week; and

(ii) Where such individual is not supporting such a spouse or dependent child described in subparagraph (b)(i) of this subsection (3), sixty percent (60%) of such individual's disposable earnings for that week;

(iii) With respect to the disposable earnings of any individual for that workweek, the fifty percent (50%) specified in subparagraph (b)(i) of this subsection (3) shall be deemed to be fifty-five percent (55%) and the sixty percent (60%) specified in subparagraph (b)(ii) of this subsection (3) shall be deemed to be sixty-five percent (65%), if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the period of twelve (12) weeks which ends with the beginning of such workweek.

SOURCES: Laws, 1980, ch. 540, § 2; Laws, 1981, ch. 469, § 4, eff from and after passage (approved April 7, 1981).

Editor's Note — Section 6 of Chapter 469, Laws of 1981, provides as follows:

"SECTION 6. The provisions of this act shall apply only to attachment, execution or garnishment proceedings instituted on or after the effective date of this act [April 7, 1981], and shall not defeat, extinguish or render void any claim or defense existing with respect to attachment, execution or garnishment proceedings instituted prior to the effective date of this act."

Cross References — Writ of garnishment binding nonexempt percentage of disposable earnings, see § 11-35-23.

Inapplicability of wages to provision permitting debtor to select tangible personal property of any kind for exemption in lieu of certain items specifically exempted by law, see § 85-3-1.

JUDICIAL DECISIONS

1. In general.

The 25 percent restriction on wage garnishment set forth in § 85-3-4(2)(a) applied to the garnishment of a father's wages in satisfaction of a judgment for past due child support, even though the 25 percent restriction does not apply in cases where the judgment is for the support of another person, where the mother no longer had custody of the children because custody had been placed in the father. Sorrell v. Borner, 593 So. 2d 986 (Miss. 1991).

ATTORNEY GENERAL OPINIONS

Statute setting maximum amount of earnings that may be levied by garnishment at "amount by which employee's disposable earnings for week exceed thirty times the federal minimum hourly wage" contemplated possibility that federal minimum wage might be changed and that withholding amount should be recalculated accordingly. Shepard, July 3, 1991, A.G. Op. #91-0450.

§ 85-3-5. Execution or attachment of personal property; plaintiff's indemnity bond; liability of officer.

If any sheriff or other officer shall levy or be about to levy an execution or attachment on any personal property claimed as exempt, and a doubt shall arise as to the liability of the property to be sold, he may demand of the plaintiff a bond, with sufficient sureties, payable to such officer, in a sufficient penalty, conditioned to indemnify and save harmless the officer against all damages which he may sustain in consequence of the seizure or sale of the property, and to pay the defendant all damages which he may sustain in consequence of the seizure or sale; and if such bond be not given, after reasonable notice, in writing, from the officer to the plaintiff, his agent or attorney, that it is required, the officer may refuse to levy, or, having levied, may dismiss the levy; but if the required bond be given, the officer shall seize and sell or dispose of the property according to the command of the process in his hands, and shall return the bond with the execution or attachment. If an officer shall seize personal property exempt from execution, he shall be liable to an action at the suit of the owner for all damages sustained thereby, unless he have taken an indemnifying bond.

SOURCES: Codes, 1857, ch. 61, art. 280 (8); 1871, §§ 2132, 2134; 1880, §§ 1245, 1247; 1892, §§ 1967, 1969; 1906, §§ 2143, 2145; Hemingway's 1917, §§ 1818, 1820; 1930, §§ 1762, 1764; 1942, §§ 314, 316.

Cross References — Bond of creditor, see § 11-33-11.
Levy upon personal property, see § 13-3-125.
Requirement of bond of indemnity, see § 13-3-157.
Remedy on bond of indemnity, see § 13-3-159.

JUDICIAL DECISIONS

1. In general; validity.
2. Failure of officer to return bond.
3. Refusal of officer to levy execution; reasonable notice.

1. In general; validity.

Where sheriff had no right to demand indemnity bond, bond taken by him not valid. Chenault v. W.T. Adams Mach. Co., 98 Miss. 326, 53 So. 629 (1910).

Where an officer has levied an execution on property, which is claimed as exempt and demands an indemnifying bond of the plaintiff under Code 1892, § 1967 but by mistake accepts a bond under another section (Code 1892, § 3482) the conditions of the two statutory bonds being different, and proceeds and sells the property, the bond actually taken will be treated in any suit thereon as though properly conditioned under the statute (Code 1892, § 946) providing that a bond in any legal proceeding which has had the effect of a bond conditioned according to law shall be treated as if properly conditioned. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630 (1905).

Where an idemnifying bond has been taken under this section [Code 1942, § 314], title to the property in the plaintiff's usee, the defendant in execution, is essential to the maintenance of a suit upon such indemnifying bond and a plaintiff's usee who has conveyed the property to another is without title, although the conveyance has been adjudged fraudulent as to his creditors. Williamson v. Wilkinson, 81 Miss. 503, 33 So. 282 (1903).

2. Failure of officer to return bond.

Failure of officer to return indemnity bond along with return of execution and delay in returning same for three or four years and not until suit instituted upon it, invalidated the bond. New Albany Whsle. Grocery Co. v. Wells, 114 Miss. 144, 74 So. 817 (1917).

3. Refusal of officer to levy execution; reasonable notice.

Where the sheriff wrote to a judgment creditor in Illinois two weeks before the first day of the court, demanding a bond to indemnify him against liability for levying an execution and advising such creditor that the execution would be held unexecuted until such bond was furnished, and the creditor failed to answer, two weeks was not an unreasonable time for the sheriff to wait for the creditor to furnish the bond so as to charge the sheriff with liability for failure to return the execution on the return day thereof. W.T. Rawleigh Co. v. Foxworth, 194 Miss. 205, 11 So. 2d 919 (1943).

ATTORNEY GENERAL OPINIONS

Under this section, an officer may demand the plaintiff post a bond to protect the officer from liability when there is a question as to whether the property is exempt from execution. If a defendant claims an exemption for certain personal property and the sheriff has a question as to whether such an exemption exists, the sheriff may demand the plaintiff post a bond prior to seizure of the property or if the property has already been seized then the sheriff may require the plaintiff to post a bond prior to the sale of the property. Hooks, April 5, 1996, A.G. Op. #96-0163.

RESEARCH REFERENCES

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 300, 301.

§ 85-3-7. Execution or attachment of personal property; defendant may sue on plaintiff's indemnity bond.

After the execution of such bond, the defendant in the execution or attachment shall be barred of any claim against the officer so seizing or selling the property, unless the obligors in the bond be or become insolvent, or the bond be otherwise invalid; and the defendant in execution or attachment may sue on the bond in the name of the payee, for his use, and recover double damages for the loss he has sustained by the seizure or sale of the property.

SOURCES: Codes, 1871, § 2133; 1880, § 1246; 1892, § 1968; 1906, § 2144; Hemingway's 1917, § 1819; 1930, § 1763; 1942, § 315.

Cross References — Remedy on bond of indemnity, see § 13-3-159.

JUDICIAL DECISIONS

1. In general.

To maintain an action on indemnifying bond hereunder, it is essential that title to the property levied upon be in the defendant in execution, and where he had transferred title to another, although to defraud creditors, no action could be maintained on the bond. Williamson v. Wilkinson, 81 Miss. 503, 33 So. 282 (1903).

The defendant may elect the remedy provided by statute, or he may sue on the indemnifying bond where one is given. Woolner v. Spalding, 65 Miss. 204, 3 So. 583 (1888).

The effect of the law is to transfer to the obligors therein the responsibility which at common law rested upon the sheriff for illegal seizure of property not liable to the writ; This substituted remedy is in lieu of any action against the sheriff, unless the obligors on the bond shall be or become insolvent, or the levy be otherwise invalid. Swain v. Alcorn, 50 Miss. 320 (1874).

§ 85-3-9. Execution or attachment of personal property; replevy by defendant.

Any defendant whose exempt property is seized may replevy the same by giving bond with sureties, to be approved by the officer seizing it, in double the value of the property, payable to the plaintiff in the execution or attachment, and conditioned to have the property forthcoming, to abide the event of an issue to be made up at the return term of the process; and in such case the officer shall deliver the property to the defendant, and return the bond with the process; and at the return term an issue shall be made up under the direction of the court, and tried, as in case of the trial of the right of property levied upon and claimed by a third person, and if found for defendant he shall recover costs, damages, and a penalty of Twenty Dollars ($20.00) of the plaintiff and his sureties on the bond of indemnity, if any have been given; but if found for plaintiff, he shall have judgment against the obligors in the replevy bond for the value of the property and costs of suit.

SOURCES: Codes, 1857, ch. 61, art. 280 (8); 1871, § 2134; 1880, § 1247; 1892, § 1969; 1906, § 2145; Hemingway's 1917, § 1820; 1930, § 1764; 1942, § 316.

JUDICIAL DECISIONS

1. In general.

Judgment debtor replevying property as exempt cannot recover attorney's fees, in absence of fraud, wilful wrong, oppression, or malice. Clayton-Hughes Co. v. Glass, 138 Miss. 839, 103 So. 501 (1925).

The exemptionist is not confined to the remedy given by the statute. Moseley v. Anderson, 40 Miss. 49 (1866).

§ 85-3-11. Proceeds of life insurance policy; named beneficiaries; certain proceeds of policies exempt from liability for debts of person insured.

(1) Except as provided in subsection (2), all proceeds of a life insurance policy including cash surrender and loan values, shall inure to the party or parties named as the beneficiaries thereof, free from all liability for the debts of the person whose life was insured, even though such person paid the premium thereon. In addition, all proceeds, including cash surrender and loan values, of a policy of life insurance owned by or assigned to another, shall inure to the beneficiary or beneficiaries named therein, subject to terms of any assignment, free from all liability for debts of the person whose life was insured.

(2)(a) The exemption authorized in subsection (1) shall not apply to that portion of the cash surrender value or loan value of any life insurance policy which exceeds the sum of Fifty Thousand Dollars ($50,000.00) as a result of premiums paid or premium deposits or other payments made within twelve (12) months of issuance of a writ of seizure, attachment, garnishment or other process or the filing of a voluntary or involuntary bankruptcy proceeding under the United States Code.

(b) The amount of any premiums for the insurance paid with intent to defraud creditors, with interest thereon, shall inure to the benefit of such creditors from the proceeds of the policy; but the insurer issuing the policy shall be discharged of all liabilities thereon by payment of its proceeds in accordance with its terms, unless before such payment the insurer shall have written notice, by or on behalf of a creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors with specification of the amount claimed.

(c) Notwithstanding any other provision to the contrary, a creditor possessing a valid assignment from the policy owner may recover from either the cash surrender value or the proceeds of the life insurance policy the amount secured by the assignment with interest.

SOURCES: Codes, 1880, § 1261; 1892, § 1964; 1906, § 2140; Hemingway's 1917, § 1813; 1930, § 1756; 1942, § 308; Laws, 1966, ch. 519, § 1; Laws, 1994, ch. 621, § 1, eff from and after July 1, 1994.

Cross References — Proceeds of life insurance policy not being subject to judicial process or assignment while in hands of company, see § 83-7-5.

JUDICIAL DECISIONS

1. In general.
2. Exempt insurance proceeds generally.
3. Policy payable to insured's estate.
4. Excess.

1. In general.

Statutes of exemption are to be liberally construed in favor of the beneficiary. United States Fid. & Guar. Co. v. Holt, 148 Miss. 885, 114 So. 818 (1927).

This and the following section [Code 1942, §§ 308 and 309] do not provide cumulative exemptions, but should be so construed as to give each distributee, under the latter section [Code 1942, § 309], sufficient only to make the whole insurance money received by him on the life of the decedent equal to his ratable share of five thousand dollars. Cozine v. Grimes, 76 Miss. 284, 24 So. 197 (1898).

The object of the section [Code 1942, § 308] is to secure the beneficiary of the policy the proceeds thereof, freed from liability for the debts of another, who has paid the premiums. Yale v. McLaurin, 66 Miss. 461, 5 So. 689 (1889); United States Fid. & Guar. Co. v. Holt, 148 Miss. 885, 114 So. 818 (1927).

2. Exempt insurance proceeds generally.

The cash surrender value of life insurance policies in which the insured reserved the right to change the beneficiary in each policy was not exempt from an action to garnish the funds to partially satisfy a decree for child support and alimony. Bonds v. Bonds, 409 So. 2d 704 (Miss. 1982).

Proceeds of policy on guardian's life, payable to ward, as beneficiary, did not liquidate guardian's debt to ward, since such proceeds were free from all liabilities of the insured. United States Fid. & Guar. Co. v. Holt, 148 Miss. 885, 114 So. 818 (1927).

However, proceeds of life policy on husband's life, payable to wife, were not exempt from judgment against her on note signed by both. Goza v. Provine, 140 Miss. 315, 105 So. 534 (1925).

Defense of mistake is available where collector of lodge obtained note from widow for debt of deceased husband, by undue influence, telling her she could not collect insurance otherwise. Sykes v. Moore, 115 Miss. 508, 76 So. 538 (1917).

Proceeds of life insurance are owned by beneficiary and may not be subjected to insured's debts without beneficiary's consent whether insured was solvent or insolvent when paid premiums. Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908).

Life insurance to amount of $10,000, payable to any special beneficiary is exempted, and not subject to payment of any debts including premiums paid by insured while he was insolvent, and though paid with intent to hinder, delay and defraud his creditors. Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908).

The procurer of a life insurance policy designating another as the beneficiary has no power, without the beneficiary's consent, to transfer any interest in it to a third party by deed or will. Jackson Bank v. Williams, 77 Miss. 398, 26 So. 965, 78 Am. St. R. 530 (1899).

A life insurance policy designating a beneficiary is the property of its beneficiary the moment of its issuance, whether then delivered or not. Jackson Bank v. Williams, 77 Miss. 398, 26 So. 965, 78 Am. St. R. 530 (1899).

The proceeds of a life insurance policy payable to the wife of the insured, are not, upon his death, assets of his estate, but belong to the wife, and she and the sureties on her bond as administratrix of his estate, are not liable for a devastavit by reason of her having appropriated the whole amount, which included the sum of two thousand dollars in excess of the ten thousand dollars' exemption. Jones v. Patty, 73 Miss. 179, 18 So. 794 (1896).

3. Policy payable to insured's estate.

Under the provisions of this section [Code 1942, § 308] where one insured his own life, the policy being made payable to himself, "his executors, administrators or assigns," he is the real beneficiary, and the proceeds, being liable to his debtors, cannot be claimed by his heirs as exempt. Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894).

4. Excess.

Creditors are entitled out of excess of insurance policy over $10,000 to amount paid for premiums on entire policy while insured insolvent, but not to whole amount of excess to satisfy their debts. Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908).

Creditors of a decedent who proceed by bill in equity against his wife and the sureties on her bond as administratrix of his estate, seeking a recovery for a devastavit in respect to so much of the proceeds of policies of insurance on his life, payable to her at his death, as exceeds the ten thousand dollars exempt by statute from liability for his debts, are entitled to no relief where the bill does not seek to subject the avails of the insurance for money illegally invested in the policies by the decedent. Jones v. Patty, 73 Miss. 179, 18 So. 794 (1896).

RESEARCH REFERENCES

ALR. Exemption of insurance proceeds as available to assignee of policy. 1 A.L.R.2d 1031.

Capacity of minor insured to effect a change of beneficiary. 14 A.L.R.2d 375.

Assignability of proceeds of claim for personal injury or death. 33 A.L.R.4th 82.

Who is "parent" entitled to proceeds of serviceman's group life insurance, where there are no named beneficiaries, and no surviving widow or children, under 38 USCS § 770(a). 73 A.L.R. Fed. 135.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 168, 169, 179, 181, 187.

§ 85-3-13. Proceeds of life insurance policy; payable to executor; limits.

The proceeds of a life insurance policy not exceeding Fifty Thousand Dollars ($50,000.00) payable to the executor, or administrator, of the insured, shall inure to the heirs or legatees, freed from all liability for the debts of the decedent, except premiums paid on the policy by any one other than the insured, for debts due for expenses of last illness and for burial; but if the life of the deceased be otherwise insured for the benefit of his heirs or legatees at the time of his death, and they shall collect the same, the sum collected shall be deducted from the Fifty Thousand Dollars ($50,000.00) and the excess of the latter only shall be exempt. No fee shall be paid or allowed by the court to the executor or administrator for handling same.

SOURCES: Codes, 1892, § 1965; 1906, § 2141; Hemingway's 1917, § 1814; 1930, § 1757; 1942, § 309; Laws, 1908, ch. 175; Laws, 1922, ch. 186; Laws, 1994, ch. 621, § 2, eff from and after July 1, 1994.

Cross References — Proceeds of life insurance policy not being subject to judicial process or assignment while in hands of company, see § 83-7-5.

JUDICIAL DECISIONS

1. In general.
2. Proceeds exempted.
3. —Proceeds derived from disability provision.
4. Persons entitled to exempt proceeds.
5. Amount of exemption.
6. —As affected by other insurance to heirs and legatees.
7. Liability for debts; excepted debts.
8. Waiver of exemption.

1. In general.

Statutes granting exemptions to heirs of decedent should be liberally construed in favor of exemptees. Abernethy v. Savage, 159 Miss. 506, 132 So. 553 (1931).

This section [Code 1942, § 309] enlarges exemption by securing to the heirs and legatees of a decedent the proceeds of insurance on his life not exceeding the amount named, even though the policy is payable to his executors or administrators. Coates v. Worthy, 72 Miss. 575, 17 So. 606, 18 So. 916 (1895).

This section [Code 1942, § 309] applies in favor of the heirs or legatees of the insured, although he left no wife or children surviving him. Coates v. Worthy, 72 Miss. 575, 17 So. 606, 18 So. 916 (1895).

2. Proceeds exempted.

The fact that the proceeds of federal war risk insurance and adjusted compensation due a deceased veteran's estate were exempt property did not avail a surety on an administratrix's bond to secure the proper administration of a veteran's estate to escape liability on the ground that such property was no part of the estate to be administered and that therefore the sureties on her bond would not be liable for her misconduct in dissipating the estate, since the appointment and qualifications of an administrator were necessary to collect such funds. Hill v. Ouzts, 190 Miss. 341, 200 So. 254 (1941).

Proceeds of war risk insurance are exempt property under this section [Code 1942, § 309]. Hill v. Ouzts, 190 Miss. 341, 200 So. 254 (1941).

Adjusted compensation, though payable to the estate of the war veteran instead of a named beneficiary, is exempted from all debts of the decedent, and from the expenses of last illness and funeral. Hill v. Ouzts, 190 Miss. 341, 200 So. 254 (1941).

Whole proceeds of policy including cash surrender value exempt and administrator entitled thereto. Dreyfus v. Barton, 98 Miss. 758, 54 So. 254 (1910).

Life policy of $1,000 on decedent's life was under this section [Code 1942, § 309] prima facie exempt property, enuring to the benefit of, and descending to the heirs, giving them right to sue thereon, and fact that there are other policies aggregating with it more than $5,000 is matter of defense. Equitable Life Assurance Soc. v. Hartfield, 87 Miss. 548, 40 So. 21 (1906).

3. —Proceeds derived from disability provision.

Proceeds of judgment recovered under disability provision were not exempt from garnishment under law exempting proceeds of life insurance policy. Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450, 62 A.L.R. 999 (1929).

4. Persons entitled to exempt proceeds.

Bankrupt may assert exemption any time before value actually paid to creditors, and where bankrupt listed policy as asset of estate, his legal representative after his death, could assert exemption. Dreyfus v. Barton, 98 Miss. 758, 54 So. 254 (1910).

A nonresident may claim the proceeds of insurance as being exempt hereunder, notwithstanding provision [Code 1942, § 333] allowing exemption to residents of the state only. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

Section [Code 1942, § 333] providing that the exemptions in this chapter shall be allowed in favor of residents of the state only cannot refer to vendees, heirs or legatees, but to the person to whom the exemption right is given. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

5. Amount of exemption.

Each distributee entitled to exemption of only pro rata share of exempt life insurance. Magee v. Bank of Hattiesburg & Trust Co., 134 Miss. 126, 98 So. 541 (1923).

6. —As affected by other insurance to heirs and legatees.

Where the heirs and legatees of a decedent are, either all or some of them, otherwise provided for by insurance than as marked out under this section [Code 1942, § 309], and the decedent should leave $5,000 insurance as marked out herein, this section [Code 1942, § 309] was not to provide cumulative exemptions, but should be so construed as to give each heir or legatee, together with what he otherwise might get, an additional amount, sufficient only to make the whole insurance received by him equal to what his ratable share of the $5,000 would be. Cozine v. Grimes, 76 Miss. 284, 24 So. 197 (1898).

7. Liability for debts; excepted debts.

Amount of decedent's insurance policies payable to administrator, up to amount of exemption to heirs, held not liable for proportionate share of attorney's fee incurred in recovering proceeds of policies. Abernethy v. Savage, 159 Miss. 506, 132 So. 553 (1931).

Debts excepted from exemption of proceeds of insurance should be paid out of other property if sufficient therefor. Delta Ins. & Realty Co. v. Benjamin, 122 Miss. 275, 84 So. 226 (1920).

The funeral expenses of decedent and the administrator's attorney's fee are not debts of the decedent within the meaning of this section [Code 1942, § 309], but a claim for nursing decedent in his last illness is. Dobbs v. Chandler, 84 Miss. 372, 36 So. 388 (1904).

The proceeds of a life insurance policy is not chargeable with a claim for nursing a decedent in his last illness, the same being a debt against him. Dobbs v. Chandler, 84 Miss. 372, 36 So. 388 (1904).

An administrator may pay out of such proceeds the funeral expenses and an administrator's attorney's fee, the same not being debts against him. Dobbs v. Chandler, 84 Miss. 372, 36 So. 388 (1904).

8. Waiver of exemption.

Bankrupt does not waive exemption by listing policies in his schedule. King v. Miles, 108 Miss. 732, 67 So. 182 (1915).

§ 85-3-15. Proceeds of life insurance policy; unassigned policies.

The proceeds of all unassigned life insurance policies payable to the executor or administrator of the insured, upon the death of the insured, shall, whether exempt or not, be paid by such insurance company, to the executor or administrator of such insured deceased, and the receipt of such executor or administrator shall constitute a full and complete acquittance to such insurance company as against the claims of any and all persons claiming any rights under such policy of insurance.

SOURCES: Codes, 1930, § 1758; 1942, § 310; Laws, 1922, ch. 186.

Cross References — Proceeds of life insurance policy not being subject to judicial process or assignment while in hands of company, see § 83-7-5.

RESEARCH REFERENCES

ALR. Testamentary direction for payment of debts or expense of administration as affecting life insurance proceeds payable to estate. 56 A.L.R.2d 865.

Who is "parent" entitled to proceeds of serviceman's group life insurance, where there are no named beneficiaries, and no surviving widow or children, under 38 USCS § 770(a). 73 A.L.R. Fed. 135.

§ 85-3-17. Judgment for personal injury.

The proceeds of any judgment not exceeding Ten Thousand Dollars ($10,000.00) recovered by any person on account of personal injuries sustained, shall inure to the party or parties in whose favor such judgment may be rendered, free from all liabilities for the debts of the person injured.

SOURCES: Codes, Hemingway's 1917, § 1815; 1930, § 1759; 1942, § 311; Laws, 1914, ch. 146.

Cross References — Actions for injury producing death, see §§ 11-7-13 et seq.

JUDICIAL DECISIONS

1. In general.
2. Interpretation.

1. In general.

Evidentiary hearing was required in order to determine whether any proceeds from the settlement of a lawsuit for the wrongful death of the debtor's mother were for personal injuries of the debtor, and thus able to be exempted under Miss. Code Ann. § 85-3-17. In re Pittman, — Bankr. —, 2003 Bankr. LEXIS 518 (Bankr. N.D. Miss. Jan. 21, 2003).

Law exempting proceeds of judgment for personal injury held inapplicable as to recovery on disability provision of indemnity contract. Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450, 62 A.L.R. 999 (1929).

Proceeds of judgment for personal injuries, not exceeding $10,000, inures to party recovering free of all liabilities for debts of injured person. Laurel Mills v. Ward, 137 Miss. 221, 102 So. 263 (1924).

2. Interpretation.

Where: (1) the bankruptcy debtor claimed an exemption in the amount of $ 16,00.00 for the settlement proceeds from a lawsuit to which she was a party; (2) the trustee duly filed an objection to the debtor's claimed exemption on the grounds that settlement proceeds were not allowable as exempt under Miss. Code Ann. § 85-3-17 et seq.; and (3) the bankruptcy judge sustained the objection, the debtor's appeal was dismissed. The bankruptcy judge concluded that permitting the exemption sought would represent an impermissible judicial broadening of the statute. Marshall v. Pongetti, 332 B.R. 284 (N.D. Miss. 2005).

RESEARCH REFERENCES

ALR. Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury. 37 A.L.R.2d 364.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 A.L.R.5th 467.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages. 52 A.L.R.5th 1.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 208-211, 233, 234.

§ 85-3-19. Beneficiaries of deceased plaintiff take damages free from debts.

Whenever suit was begun in the name of the party injured, and such party shall die while said suit is pending in any court, and said suit shall be revived in the name of the administrator, any sum finally recovered in any such suit, if such deceased left surviving a husband or wife, or children or father or mother, to whom such judgment shall be distributed, as may be provided by law, such wife or children, or father or mother, or husband who may be entitled to recover or receive such moneys shall take same free from all liabilities for the debts of the deceased, and also free from all liabilities for the debts of the person or persons, as above entitled to receive them.

SOURCES: Codes, Hemingway's 1917, § 1816; 1930, § 1760; 1942, § 312; Laws, 1914, ch. 146.

RESEARCH REFERENCES

ALR. Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury. 37 A.L.R.2d 364.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 208-211, 233, 234.

§ 85-3-21. Homestead exemption; land and buildings.

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred sixty (160) acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Seventy-five Thousand Dollars ($75,000.00); provided, however, that in determining this value, existing encumbrances on such land and buildings, including taxes and all other liens, shall first be deducted from the actual value of such land and buildings. But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 17(1); 1857, ch. 61, art. 281; 1871, § 2135; 1880, § 1248; 1892, § 1970; 1906, § 2146; Hemingway's 1917, § 1821; 1930, § 1765; 1942, § 317; Laws, 1938, ch. 125; Laws, 1950, ch. 360; Laws, 1970, ch. 323, § 1; Laws, 1979, ch. 447, § 1; Laws, 1991, ch. 479, § 1, eff from and after July 1, 1991.

Cross References — Power of legislature to regulate sale of homesteads, see MS Const Art. 4, § 94.

Tax exemptions of homestead, see §§ 27-33-1 et seq.

Descent of exempt property, see §§ 91-1-19 et seq.

JUDICIAL DECISIONS

1. In general.
2. Establishment of homestead.
3. Separate tracts or lots.
4. Title or interest required.
5. Persons entitled.
6. Rights of survivors.
7. Sale or transfer.
8. Incumbrances on homestead.
9. Area of homestead.
10. Value of homestead.
11. Time for claiming exemption.
12. Estoppel to claim homestead.
13. Abandonment.
14. —Removal.
15. Mobile homes.

1. In general.

Homestead exemption provision is intended to protect entire family from misfortunes or imprudence of primary breadwinner, and is not dependent on breadwinner's continued status as homeowner or on his or her intention to acquire another homestead with proceeds; it is intended to protect home from forced sale and to protect debtor's property from creditors to provide source of revenue for support of breadwinner and family. In re

Williamson, 844 F.2d 1166 (5th Cir. Miss. 1988).

Husband may convey homestead to wife regardless of his intention toward creditors, because conveyance of homestead does not "defraud" creditors; homestead is exempt from creditors irrespective of conveyance. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

Judgment based on division of community property is debt subject to homestead exemption like any other; however, judgment will defeat exemption to extent that judgment creditor shows it to be based on child support. Pickle v. Pickle, 476 So. 2d 32 (Miss. 1985).

Judgments do not constitute a lien until enrolled; additionally, the homestead exemption in effect at the time judgments are enrolled is applicable in an action to foreclose judgment liens on property sold under a deed of trust, despite the fact that the amount of the homestead exemption is subsequently increased. Hall v. Panola County Bank, 412 So. 2d 238 (Miss. 1982).

One does not own homestead rights in property unless he has some legal right to its possession. McGee v. Chickasaw County Sch. Bd., 239 Miss. 5, 120 So. 2d 778 (1960).

A tort action does not come within the constitutional provision prohibiting impairment of existing contracts, and statute increasing the homestead exemption could properly be applied to judgment which was rendered after the passage of the act, even though the cause of action arose before the statute was passed. Odom v. Luehr, 226 Miss. 661, 85 So. 2d 218 (1956).

Statutes granting homestead exemption are entitled to be liberally construed. Daily v. Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951); Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151 (1959).

Neither the cases dealing only with urban property and those dealing with an urban tract and a rural tract as constituting together one homestead are applicable to a case where rural lands are involved. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

Exemption laws are construed liberally in favor of the owner of the property exempted. Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

Homestead exemption would prevent declaration of lien on homestead land for debts which occupants themselves owed as well as debts of others. Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

The homestead right being a favored one in law, whenever there is serious doubt as to whether the property is or is not a homestead, the doubt should be resolved in favor of the exemptionist, sustaining, instead of defeating, the estate, which is created by sound public policy. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

The homestead is the preservation of the family mansion and a certain quantity of land pertaining thereto to the debtor and his family as a place of residence; The policy of the law is that the family should enjoy the property as a home, contributing to their support, and if the debtor or some member of the family do not occupy the premises as a homestead, exemption ceases. Acker v. Trueland, 56 Miss. 30 (1878).

The statute increasing exemptions is inapplicable as to existing creditors. Lessley v. Phipps, 49 Miss. 790 (1874).

The term "land," in this statute, embraces a leasehold estate. Johnson v. Richardson, 33 Miss. 462 (1857); McGrath v. Sinclair, 55 Miss. 89 (1877); King v. Sturges, 56 Miss. 606 (1879).

2. Establishment of homestead.

Householder need not own, and thus need not sell, both land and buildings to qualify for exemption in proceeds so long as property sold was used for homestead purposes; and fact that householder and his family continued to live on land as lessees does not make householder ineligible for homestead exemption. In re Williamson, 844 F.2d 1166 (5th Cir. Miss. 1988).

The language of Mississippi Code § 85-3-25 indicates that a homestead declaration is voluntary and not mandatory. Shows v. Watkins, 485 So. 2d 288 (Miss. 1986).

Income producing property under a sand and gravel lease is not ipso facto ineligible to be homestead. Shows v. Watkins, 485 So. 2d 288 (Miss. 1986).

It is not absolutely necessary for the husband to acquire the property by inheritance in order to be entitled to claim it as a homestead. Biggs v. Roberts, 237 Miss. 406, 115 So. 2d 151 (1959).

Where at the time the husband conveyed property to his wife the parties and their children were residing on the property and had been for a number of years, no new home had been acquired by the husband, and, after the husband had left the city, the wife and the children continued to occupy the property, the property was the homestead of the parties, and the husband had a right to convey to his wife the extent and value of the homestead regardless of his intention toward his creditors. Howell v. General Contract Corp., 229 Miss. 687, 91 So. 2d 831 (1957), suggestion of error overruled, opinion modified, 229 Miss. 687, 93 So. 2d 175 (1957).

The statute does not require the actual utilization of every acre of land in a tract before it can be claimed as a homestead. Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

Occupancy coupled with residence, citizenship, and status of being head of family perfects right so that it cannot be defeated because children remained at school when father removed. Roberts v. Thomas, 94 Miss. 219, 48 So. 408, 136 Am. St. R. 573 (1909).

Land, always occupied as homestead by claimant except for about 6 weeks when she lived with her husband on his father's place, was her homestead, although after separating from husband she rented part of land for one year and stayed elsewhere at night but kept one room of the house and a horse and other animals on the land. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

A decree in equity adjudging a conveyance from a husband to his wife, fraudulent as to the creditors of the husband, and directing a sale of the land to pay the debts, does not preclude the husband from moving upon the land with his family and making it his homestead; and if he make it his homestead after the rendition of the decree, it will cease to be liable to sale thereunder. Dulion v. Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. R. 563 (1902).

If one has two tracts of land, either of which he might claim as his homestead, and convey one, he will be held to have selected the other as his homestead. Rutherford v. Jamieson, 65 Miss. 219, 3 So. 412 (1888).

A tenancy at will of a forty-acre tract containing the dwelling, is sufficient to carry the exemption of a detached forty acres owned in fee and cultivated. King v. Sturges, 56 Miss. 606 (1879); Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

Actual residence and occupation of the land as a home by the family is essential to give it the character of a homestead; after it has acquired that status, literal or actual residence is not required. Campbell v. Adair, 45 Miss. 170 (1871); Hand v. Winn, 52 Miss. 784 (1876).

3. Separate tracts or lots.

In an action to determine the validity of a deed to property alleged to be homestead in which grantor's wife did not join, where the evidence showed that the tract in controversy and a non-contiguous tract upon which grantor's dwelling was located were both used for timber, it was error for the chancellor to hold that the land in controversy was not homestead property, even though he found that the value of the other tract, upon which the dwelling house was situated, was in excess of the valuation mentioned in the homestead statute. Hendry v. Hendry, 300 So. 2d 147 (Miss. 1974).

Where lands were not contiguous because a road separated them, such a separation did not necessarily defeat a homestead claim. Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

Where a decedent resided on one tract of land and used this tract with another as a farm unit which consisted of less than 160 acres, the widow was entitled to claim both parcels of land as a homestead although they were not contiguous. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

Plaintiff claiming city residence as homestead could not also claim 80-acre tract two and one-half miles from city residence, although value of both did not exceed $3,000. Nye v. Winborn, 120 Miss. 1, 81 So. 644 (1919).

Person owning and residing on four acre lot and owning and cultivating an adjoining parcel, separated from the former parcel by a railroad, could claim both as homestead where both did not exceed prescribed area and value for homesteads. Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

4. Title or interest required.

Householder's interest in property under land sale contract is sufficient for eligibility for homestead protection under Miss. Code § 85-3-21. In re Williamson, 844 F.2d 1166 (5th Cir. Miss. 1988).

Mere occupancy of land under a deed which confers no title will not support a claim for homestead exemption; Nor can a widow derive any homestead right from her husband who, with her, occupied at his death as tenant at will the land which he conveyed to others. Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937), overruled on other grounds, Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

The statute providing for the homestead exemption for land "owned and occupied by the debtor as a residence," the right must in all cases be founded on ownership or some assignable interest in the land. Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937), overruled on other grounds, Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

The homestead exemption granted by statute is not on any particular interest in land, and interest need not be ownership in fee simple, and all that is necessary is that the exemptionist have an assignable interest in the land. Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937), overruled on other grounds, Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

Husband or wife must have some kind of ownership in land before homestead claim can arise. Stuart v. Kennedy & Co., 145 Miss. 728, 110 So. 847 (1927).

Property must be owned and actually occupied by party entitled to exemption. Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922).

The homestead right is founded on ownership of some assignable interest in the land. Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891); Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

5. Persons entitled.

The purpose of the amendment to § 85-3-21 deleting the language "and having a family" from the requirements necessary for a person to claim the homestead exemption was to allow single persons to claim the exemption, the same as persons with families. Matter of Memorial Hosp. v. Franzke, 634 So. 2d 117 (Miss. 1994).

Householders are now eligible for homestead exemption even if single. Pickle v. Pickle, 476 So. 2d 32 (Miss. 1985).

Where the former husband lost his right to occupy the marital home under a divorce decree giving the wife the right to exclusive use of the home, the husband lost his homestead rights under Code 1972 §§ 27-33-3 & 85-3-21, so that the husband thus held no homestead exemption on the property which could be used to defeat the former wife's right to partition under Code 1972 § 11-21-3; the existence of homestead rights in the former wife was irrelevant, since she waived them by bringing a suit for partition sale. Blackmon v. Blackmon, 350 So. 2d 44 (Miss. 1977).

Signers of trust deed who were married and living upon land conveyed by such deed as a homestead held entitled to homestead exemption where their spouses did not sign deed. Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

"Householder," in statute allowing homestead exemption to debtor householder under sixty years, means a person who has a family whom he keeps together and provides for, and of which he is the head and master. Moore v. Sykes' Estate, 167 Miss. 212, 149 So. 789 (1933).

One, to whom a part of land held in common had been allotted by partition, subject to debts owed by him to his cotenants, could claim homestead exemption therein as against his former cotenants. Woods v. Bowles, 92 Miss. 843, 46 So. 414 (1908); Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

Only a person who is a citizen and resident of this state, as well as a householder having a family, is entitled to homestead exemption. Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1900).

An aged widower living with his married son of middle age, in a house built and controlled by the same, on land of the father who receives no rent and contributes nothing to the support of the family beyond his own maintenance, and who is under no moral and legal duty to contribute to the support of the family, is neither a "householder" nor the head of a family so as to entitle him to the homestead exemption under this section [Code 1942, § 317]. Powers v. Sample, 72 Miss. 187, 16 So. 293 (1894).

Tenant at will of land containing dwelling is entitled to homestead exemption. King v. Sturges, 56 Miss. 606 (1879); Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936).

A tenant in common, occupying with the consent of his cotenants, is entitled to the exemption. McGrath v. Sinclair, 55 Miss. 89 (1877).

One who shelters but does not support an informally adopted daughter and her husband, is not entitled to the exemption. Hill v. Franklin, 54 Miss. 632 (1877).

An unmarried man is not the head of a family because his adult son, who is able-bodied and capable of earning a support, lives with him. Hill v. Franklin, 54 Miss. 632 (1877); Cox v. Martin, 75 Miss. 229, 21 So. 611 (1897).

The wife is deemed a "householder, and having a family," under the statute. Partee v. Stewart, 50 Miss. 717 (1874).

One becoming the head of a family after judgment and levy, but before sale, is entitled to the exemption. Trotter v. Dobbs, 38 Miss. 198 (1859); Irwin v. Lewis, 50 Miss. 363 (1874); Letchford v. Cary, 52 Miss. 791 (1876); Jones v. Hart, 62 Miss. 13 (1884).

6. Rights of survivors.

Judgment creditor of husband and wife who together owned property as tenants by the entirety could levy execution and sell that portion of homestead property which exceeded value of statutory homestead exemption which had vested in wife following husband's death; Section 91-1-23 was not applicable to debt for which surviving spouse was jointly and severally liable. In re Osborne, 120 B.R. 64 (Bankr. N.D. Miss. 1990).

It is clearly the purpose of the statute to give the surviving husband or wife, who has been an exemptionist, the benefit of the exemption if the survivor was over sixty years of age at the time of the partner's death. Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

Amendment providing husband or wife, widow or widower, over 60 years of age, should not be deprived of exemptions, held to preserve only existing exemptions. Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

Widow over 60 years of age when husband died, with no one dependent on either for support, had no exemption rights in homestead preserved to her because she was over 60 years of age. Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

Court could not order sale of homestead of widow more than 60 years of age who had moved from premises, but was being supported in part from products. Wright v. Coleman, 137 Miss. 699, 102 So. 774 (1925).

Laws 1914, c 225, extending homestead exemption to widow or widower over 60 years of age who had been exemptionist regardless of having a family or occupying the homestead, is not unconstitutional as impairing the obligation of a contract made before the enactment of such statute, where property was exempt at time contract was made and also at time statute was passed. McCreight v. W.W. Scales & Co., 134 Miss. 303, 99 So. 257 (1924).

Surviving widow entitled to occupy homestead and heirs cannot have partition thereof. Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1908).

7. Sale or transfer.

Where debtor had title to homestead property, actually occupied it, and had citizenship status at place of homestead, fact that debtor had entered agreement prior to bankruptcy to sell his homestead did not of itself deprive debtor of right to claim exemption in proceeds from sale of his homestead. In re Williamson, 49 B.R. 675 (Bankr. S.D. Miss. 1985), appeal decided, 804 F.2d 1355 (5th Cir. 1986).

Widow could not have homestead property sold to satisfy her widow's allowance and property was not subject to partition or sale during widowhood without her consent. Mills v. Mills, 279 So. 2d 917 (Miss. 1973).

Widow is not entitled to have homestead property sold and at the same time retain her homestead rights. Mills v. Mills, 279 So. 2d 917 (Miss. 1973).

That property is occupied by the judgment debtor's mother as a homestead does not preclude a sale of his undivided interest therein to satisfy the judgment. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640 (1964).

Under the statute, the proceeds of a voluntary sale of a homestead are exempt under all circumstances, regardless of the vendor's continuing to be a householder, or his acquiring another homestead, or the intent with which he keeps the proceeds. Davis v. Lammons, 246 Miss. 624, 151 So. 2d 907 (1963).

Although wife did not sign timber deed, grantor and wife could not set up homestead claim against grantee in manner different from that prescribed by statute. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

Where wife did not sign timber deed executed by husband, court, on suit by grantee, could not allot homestead in absence of declaration by grantor, but should have appointed commissioner to make allotment before adjudicating rights of parties. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

Transfer of part of homestead for purpose of defeating execution on crops, not invalid as owner's motive was immaterial. Lindsey v. Holly, 105 Miss. 740, 63 So. 222 (1913).

Conveyance of homestead by husband without wife's joinder conveys no estate whatever. McKenzie v. Shows, 70 Miss. 388, 12 So. 336, 35 Am. St. R. 654 (1893).

An insolvent debtor, as against a judgment creditor, has a right to convey his homestead to another in consideration for a conveyance to his wife of real estate, not exempt, and such real estate is not liable for his debts. Airey v. Buchanan, 64 Miss. 181, 1 So. 101 (1887).

There is no provision in the Code of 1880 which precludes the owner from devising his homestead as any other land, and only in case of his dying intestate can his widow assert her rights of survivorship. Osburn v. Sims, 62 Miss. 429 (1884).

The fraudulent conveyance of the homestead does not defeat the exemption. Edmonson & Winn v. Meacham, 50 Miss. 34 (1874).

8. Incumbrances on homestead.

Bank was entitled to foreclose deed of trust against homestead property for advances made to the husband, acting alone and without his wife's knowledge, which were additional to the original indebtedness secured by the deed of trust contract where the contract contained a "dragnet clause" which clearly and unambiguously provided that its purpose was to "secure all loans and advances which Beneficiary has made or may hereafter make to the Grantor, or any of them"; nor did the fact that the husband had pledged certain cattle as additional security for the advances, which were missing when the bank sought to replevy them, amount to a waiver on the part of the bank of the security granted it by the deed of trust. Newton County Bank, Louin Branch Office v. Jones, 299 So. 2d 215 (Miss. 1974).

Deed of trust, securing purchase-money of homestead, is valid without wife's signature. Stuart v. Kennedy & Co., 145 Miss. 728, 110 So. 847 (1927).

Option to purchase is a covenant running with land enforceable against grantor after he marries and occupies land as homestead. Minor v. Interstate Gravel Co., 130 Miss. 553, 94 So. 3 (1922).

Prior incumbrances or covenants running with land defeat homestead exemption subsequently arising. Minor v. Interstate Gravel Co., 130 Miss. 553, 94 So. 3 (1922).

Exemption of homestead acquired by occupation after execution, but before sale, does not confer right to convey land not his homestead, free from lien. Bank of Phila. v. Posey, 130 Miss. 530, 92 So. 840 (1922), on suggestion of error, 130 Miss. 825, 95 So. 134 (1923).

Divorced wife of owner who received portion of wild land by decree in divorce cannot set up homestead right against purchaser under prior trust deed made by husband. Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

Husband and wife may execute valid mortgage on after-acquired property although used as homestead. Adkinson & Bacot Co. v. Varnado, 91 Miss. 825, 47 So. 113 (1908).

Growing trees being a part of realty, a conveyance by a husband of all the merchantable timber on his homestead with indefinite time for its removal, is an incumbrance of the homestead and void if the wife does not join. McKenzie v. Shows, 70 Miss. 388, 12 So. 336, 35 Am. St. R. 654 (1893).

Where an unmarried man executes a deed of trust on his land to secure a debt due by him, and afterwards marries and occupies the land as a homestead, and before the bar of the statute of limitations attaches, makes a new promise in writing to pay the debt, a new period is thereby given for both the debt and security to run, and such security is paramount to his homestead claim. Hambrick v. Jones, 64 Miss. 240, 8 So. 176 (1886).

9. Area of homestead.

A rural homesteader should ordinarily be entitled to as much as 160 acres for homestead purposes if such an amount of his land is so located as to be truly susceptible of being devoted to homestead purposes as a unit, and without giving the homestead laws an unreasonable application for the protection of the homesteader. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

Householder claiming exemption of rural land sought to be subjected to payment of his debts held limited to 160 acres. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

Decree directing proceeds of sale of deceased's interest in common estate in excess of 160-acre homestead be paid to administrator for benefit of creditors held correct. Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

10. Value of homestead.

Where debtor in bankruptcy failed to specify particular acreage constituting his homestead at time he claimed exemption, court assumed fungibility of all 854 acres comprising debtor's plantation with debtor's equity evenly distributed throughout, and thus pro-rated his interest in 160 acres claimed according to his total equity interest in entire tract. In re Williamson, 844 F.2d 1166 (5th Cir. Miss. 1988).

If wife's interest in homestead exceeds $30,000, she may keep entire value of that interest from husband's creditors. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

The question of value has no place in the consideration of the rights of a surviving widow to use and occupancy of the homestead, her rights being absolute so long as she remains a widow; the limitation on the value of the homestead that is exempt from creditors' demands, set by § 85-3-21, is not applicable. Stockett v. Stockett, 337 So. 2d 1237 (Miss. 1976).

The value of the homestead is not material in passing on the rights of the surviving widow, since it was never the intention of the legislature that 160 acres of land should be reduced in quantity, save in one instance, and that is where the rights of the creditors are involved. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

The exemption covered the land to the extent of $3,000 in value, regardless of the exemptioner's interest therein and without the deduction of existing encumbrances on the land. Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937), overruled on other grounds, Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

Householder claiming exemption of rural land sought to be subjected to payment of his debts held limited to $3,000 in value. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

A debtor who asserts a homestead exemption in an estate in common which exceeds one hundred sixty acres in quantity has no floating claim to an exemption of his interest in the entire estate; his exemption in such estate is limited to a homestead of the proper quantity, as well as value, and if the value of the debtor's interest in the one hundred sixty acres constituting the homestead happens to be worth less than three thousand dollars, this fact does not entitle him to an exemption in the remainder of the estate. Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

11. Time for claiming exemption.

Homestead exemption as to land sold under execution could not be claimed on appeal in a subsequent suit where it appeared that no such claim was asserted at the time of the sale. Clark v. Carpenter, 201 Miss. 436, 29 So. 2d 215 (1947).

Judgment debtor may claim exemption any time before sale. Woods v. Bowles, 92 Miss. 843, 46 So. 414 (1908).

12. Estoppel to claim homestead.

Debtor in bankruptcy claiming homestead exemption did not waive his homestead rights in proceeds of sale of homestead property by not making his claim until after sale was consummated. In re Williamson, 844 F.2d 1166 (5th Cir. Miss. 1988).

An exemptionist who fails to assert his exemption in a chancery proceeding fully adjudicating his right cannot afterwards claim it against a purchaser under the decree. Henderson v. Still, 61 Miss. 391 (1883).

13. Abandonment.

One may claim homestead exemption only in property owned and occupied as residence, and husband abandoned homestead rights when he voluntarily left property without intent to return. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

75-year old homeowner was not divested of his rights to claim homestead exemption by virtue of his conviction for murder and sentence of life imprisonment, despite claim that he was not entitled to the exemption because he had no legal right to occupy the property and that by voluntarily murdering victim he had abandoned any claim to homestead that he would otherwise have. Roberts v. Grisham, 493 So. 2d 940 (Miss. 1986).

Where husband at time of separation from wife removed from their homestead without intention to return, he thereby abandoned his and his wife's homestead rights therein, though wife remained in possession under color of a deed given in settlement of claims for support. Lewis v. Ladner, 177 Miss. 473, 168 So. 281 (1936), error overruled, 177 Miss. 484, 172 So. 312 (1937).

That wife remained in occupancy of homestead abandoned by husband held immaterial as to existence of homestead rights, where by agreeing to a marital separation she consented to his removal. Lewis v. Ladner, 177 Miss. 473, 168 So. 281 (1936), error overruled, 177 Miss. 484, 172 So. 312 (1937).

Confinement in jail does not constitute abandonment of homestead. Lindsey v. Holly, 105 Miss. 740, 63 So. 222 (1913).

Moving from homestead to conduct boarding house in near-by town with borrowed money secured by mortgage on homestead was abandonment thereof, although owner intended to return if she failed to pay for place moved to. Bennett Bros. v. Dempsey, 94 Miss. 406, 48 So. 901, 136 Am. St. R. 581 (1909).

Where one abandons a rural homestead and acquires another in town, but abandons the latter, intending as soon as practicable to reoccupy the country home, and makes preparations therefor, but is prevented by protracted sickness, which after the date upon which he expected to reenter ends in death, the country place becomes revested with its homestead character and is exempt. Ross v. Porter, 72 Miss. 361, 16 So. 906 (1895).

So long as the wife and family occupy the premises, though abandoned by the husband, the exemption continues until he acquire another homestead. Thoms v. Thoms, 45 Miss. 263 (1871).

14. —Removal.

Owner of country homestead may purchase house in village, move family thereto to educate children, qualify as elector and hold a municipal office without forfeiting right to claim country home as exempt, if he keep actual possession in person or by some member of his family, cultivates it, continues to claim it as homestead and intends to return as soon as object of moving to village accomplished. Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

Where a husband and wife temporarily remove from their homestead to cultivate other lands for a year or two, leaving their children in occupancy of the home, intending themselves all the time to return to it, they have not parted with its possession.

Culp v. Wooten, 79 Miss. 503, 31 So. 1 (1902).

Both the intent to reoccupy speedily and cause of removal must exist to protect the homestead. Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892).

Ceasing to reside on a homestead renders it liable for debts unless the removal be temporary, by reason of casualty or necessity, and with the purpose of speedily reoccupying as soon as the cause is removed. Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892).

Where a husband and family reside on a certain place belonging to him as a homestead, then move temporarily to a place belonging to his wife with the purpose of returning to his homestead, and while thus residing on the wife's place the husband conveyed away his place without the wife joining in the deed, after the death of the husband his widow and minor children cannot maintain a bill claiming homestead in the land conveyed by him. Majors v. Majors, 58 Miss. 806 (1881).

15. Mobile homes.

A debtor, who did not own the land on which her mobile home was located, could not claim the mobile home as exempt homestead property. Cobbins v. Henderson, 227 F.3d 302 (5th Cir. 2000).

ATTORNEY GENERAL OPINIONS

Seven-year-old who is owner in fee simple title of property, whose mother does not claim homestead exemption on any other land in her name or in that of another child, and who occupies home with his mother, stepfather and younger brother may claim homestead exemption; such exemption is not limited to "head of family" so long as all statutory requisites are present. Barlow, Sept. 23, 1992, A.G. Op. #92-0639.

A homestead exemption claimant who is a bona fide resident of Mississippi, who owns and is occupying a home legally assessed on the land roll, but is displaying a license plate from another state on a vehicle, should be removed from the homestead exemption roll until such time he or she submits proof of full compliance with the Mississippi road and bridge privilege tax laws. Schrimpshire, March 30, 2007, A.G. Op. #07-00162, 2007 Miss. AG LEXIS 65.

RESEARCH REFERENCES

ALR. Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 A.L.R.2d 515.

Endowment policy as life insurance within exemption law. 30 A.L.R.2d 751.

Homestead exemption as extending to rentals derived from homestead property. 40 A.L.R.2d 897.

Estate or interest in real property to which a homestead claim may attach. 74 A.L.R.2d 1355.

Contractual waiver of after-acquired homestead exemption. 82 A.L.R.2d 982.

Effect of divorce on homestead. 84 A.L.R.2d 703.

Validity of contractual stipulation or provision waiving debtor's exemption. 94 A.L.R.2d 967.

Choice of law as to exemption of property from execution. 100 A.L.R.3d 1235.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract. 5 A.L.R.4th 1310.

Lien of judgment on excess value of homestead. 41 A.L.R.4th 292.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 251, 262.

40 Am. Jur. 2d, Homestead §§ 14 et seq.

13A Am. Jur. Pl & Pr Forms (Rev), Homestead, Forms 21 et seq. (preventing or setting aside forced sale of homestead).

13A Am. Jur. Pl & Pr Forms (Rev), Homestead, Forms 91, 92 (termination of homestead).

9A Am. Jur. Legal Forms 2d Homestead §§ 135: 11 et seq. (claim of homestead exemption).

9A Am. Jur. Legal Forms 2d Homestead §§ 135:73, 135:74 (declaration of abandonment of homestead).

9A Am. Jur. Legal Forms 2d Homestead §§ 135:91 et seq. (release or waiver of homestead).

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:309 (waiver of homestead).

6 Am. Jur. Proof of Facts, Homestead, Proof No. 1 (existence of homestead exemption).

6 Am. Jur. Proof of Facts, Homestead, Proof No. 2 (termination of homestead exemption by removal from premises).

§ 85-3-23. Homestead exemption; land and buildings; insurance proceeds; personal property.

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale under execution or attachment the land and buildings owned and occupied as a residence by such person, also the proceeds of any insurance, fire or otherwise, on any such buildings destroyed or damaged by fire, tornado or otherwise, not to exceed in value, save as hereinafter provided, Seventy-five Thousand Dollars ($75,000.00), and personal property to be selected by him or her not to exceed in value Two Hundred Fifty Dollars ($250.00) or the articles specified as exempt to the head of a family; provided, however, that no sum or amount due, or to become due such person, nor any part thereof, for or on account of wages, salaries or commissions, shall in any proceedings be selected or claimed as exempt under this section. But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein.

SOURCES: Codes, 1871, § 2140; 1880, § 1249; 1892, § 1971; 1906, § 2147; Hemingway's 1917, § 1822; 1930, § 1766; 1942, § 318, Laws, 1926, ch. 159; Laws, 1931, ch. 18; Laws, 1970, ch. 323, § 2; Laws, 1979, ch. 447, § 2; Laws, 1991, ch. 479, § 2, eff from and after July 1, 1991.

Cross References — Power of legislature to regulate sale of homesteads, see MS Const Art. 4, § 94.

JUDICIAL DECISIONS

1. In general.
2. Homestead exemption.
3. —Separate tracts or lots.
4. —Residence and occupancy.
5. —Buildings.
6. Selection of homestead.
7. Persons entitled.
8. Sale or transfer of homestead.
9. Mortgage on homestead.
10. Amount of homestead exemption.
11. Selection of personal property as exempt.
12. —Other statutory exemptions in lieu.
13. Sale or transfer of personal property.
14. Rights of survivors.

1. In general.

Garnishment constitutes "attachment" within statute exempting from attachment. First Nat'l Bank v. Ellison, 135 Miss. 42, 99 So. 573 (1924).

This section [Code 1942, § 318] held to include unincorporated urban districts. Harris Ice Cream Co. v. Hartsock, 127 Miss. 271, 90 So. 7 (1921).

2. Homestead exemption.

Creditor's argument that Miss. Code § 85-3-23 did not apply to debtors because a deed of trust was issued to secure a purchase money lien on the property and the homestead rights had not yet attached was without merit where the debtors had owned the property and had been occupying the property for some time prior to the time that the husband signed the deed of trust. Rhymes v. Countrywide Home Loans, Inc. (In re Rhymes), — Bankr. —, 2008 Bankr. LEXIS 779 (Bankr. S.D. Miss. Mar. 14, 2008).

One claiming city residence as homestead may not also claim 80-acre tract about two and one-half miles from city residence, although value of both may not exceed exemption allowed. Nye v. Winborn, 120 Miss. 1, 81 So. 644 (1919).

3. —Separate tracts or lots.

The homestead may consist of a tract partly in city and partly in country. Fitz Gerald v. Rees, 67 Miss. 473, 7 So. 341 (1890).

Where lots separate from the residence are leased to one not a servant, they are not exempt. Rhyne v. Guevara, 67 Miss. 139, 6 So. 736 (1889).

A tract separated from the residence lot by a railroad depot and right of way may be part of the homestead. Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

The homestead may include lots separated from the residence by a public street where used in connection with it. Acker v. Trueland, 56 Miss. 30 (1878).

4. —Residence and occupancy.

One cannot claim as a homestead a tract owned by him on the ground that he is living on an adjoining tract in which he has no assignable interest. Davis v. Davidor, 200 Miss. 657, 27 So. 2d 371 (1946).

Where a husband and his family slept and had their breakfast on property which they rented and which was noncontiguous to land owned by him, and on which they maintained a restaurant, in which they daily had their dinners and suppers and during an interval when, because of various transfers, the title to the restaurant property was in third parties, the husband executed a deed of trust on the restaurant property, which property was afterwards reconveyed to him, such property was not their homestead at the time the deed of trust was given by the husband. Meyers v. AMOCO, 192 Miss. 180, 5 So. 2d 218 (1941).

Occupancy coupled with residence, citizenship, and status of being head of family perfects right so that it cannot be defeated because children remained at school when father removed. Roberts v. Thomas, 94 Miss. 219, 48 So. 408, 136 Am. St. R. 573 (1909).

Land, always occupied as homestead by claimant except for about 6 weeks when she lived with her husband on his father's place, was her homestead, although after separating from husband she rented part of her land for one year and stayed elsewhere at night but kept one room of the house and a horse and other animals on the land. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

Owner of country homestead may purchase house in village, move thereto to educate children, qualify as elector and hold municipal office, without forfeiting right to claim country home as exempt, if he keeps actual possession in person or by some member of his family, cultivates it, continues to claim it as homestead and intends to return as soon as object of moving to village is accomplished. Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

5. —Buildings.

A storehouse in which the wife conducts business, separated by a fence from the residence, is a part of the homestead. Baldwin v. Tillery, 62 Miss. 378 (1884).

One who owns and resides upon a town lot as a homestead may erect thereon any building or buildings necessary or convenient to his residence, or to the business in which he and his family may be engaged, and may hold the entire premises as homestead exemption if the value thereof be within the prescribed limit. Baldwin v. Tillery, 62 Miss. 378 (1884).

6. Selection of homestead.

Judgment debtor may claim exemption any time before sale. Woods v. Bowles, 92 Miss. 843, 46 So. 414 (1908).

A debtor, whose conveyance of land to his wife was set aside by his creditors as being fraudulent, could thereafter move upon the land and claim homestead exemption. Dulion v. Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. R. 563 (1902).

The right to make a selection of a homestead by statutory declaration is in the owner of the land, and if he die without making the selection his widow, to whom the homestead descended, as tenant in common with their children, has not the right of selection. Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

7. Persons entitled.

A married woman living with her husband is not the "head of a family" within the meaning of the statute. In re Logan, 1 F. Supp. 225 (S.D. Miss. 1932).

A decree appointing a receiver impliedly limits the rights of the receiver to property which is not exempt from execution. Levy v. T.R. Rosell & Co., 82 Miss. 527, 34 So. 321 (1903).

A contract by mercantile partners who are largely indebted, that their business shall be conducted by others, and that all money arising therefrom shall be applied pro rata to the debts of the partnership with authority to the managers to replenish the stock, but requiring that all proceeds shall be deposited in a bank and paid out ratably to his creditors, preclude the partners from claiming any exemption in the property covered by the contract. Levy v. T.R. Rosell & Co., 82 Miss. 527, 34 So. 321 (1903).

Only a person who is both a citizen and a resident of this state, as well as a householder having a family, is entitled to homestead exemption. Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1900); Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913).

An unmarried man occupying alone the back room of his law office as a sleeping apartment and taking his meals at a hotel, but who provides a servant for and supports an aged grandfather living in a house owned by defendant, is not a "householder having a family," and is not entitled to the exemption of personal property allowed by this statute. Pearson v. Miller, 71 Miss. 379, 14 So. 731, 42 Am. St. R. 470 (1893).

A debtor may have a homestead exemption in land which he owns in common with others and as against creditors consent of the co-tenants to his occupancy is not essential. Lewis v. White, 69 Miss. 352, 13 So. 349, 30 Am. St. R. 557 (1891).

8. Sale or transfer of homestead.

Equity will enjoin the sale, under execution, of a homestead so heavily encumbered that the injury to the owner will be attended by no benefit to the creditor. Koen v. Brill, 75 Miss. 870, 23 So. 481, 65 Am. St. R. 633 (1898).

9. Mortgage on homestead.

Husband and wife may execute valid mortgage on after-acquired property used as homestead. Adkinson & Bacot Co. v. Varnado, 91 Miss. 825, 47 So. 113 (1908).

10. Amount of homestead exemption.

Householder claiming exemption of rural land, held limited to $3,000 in value. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

Creditors entitled to excess over homestead value where other property insufficient to pay debts. Marx v. Haley, 92 Miss. 113, 45 So. 612 (1908).

Homestead in towns measured by value not exceeding $2,000 and not territorial extent. Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66 (1906).

Where a judgment-debtor owns jointly with his wife a city lot, he is entitled to a homestead exemption therein of two thousand dollars to be taken wholly from his one-half interest. Kripperdorf v. Wolfe, 70 Miss. 81, 12 So. 26 (1892).

Part of a town lot on which a house is occupied as a residence at certain seasons of the year, and separated by a fence only from the main part of the lot on which is situated the house, usually occupied as a homestead, is exempt from execution against the owner, unless it be shown that the whole is worth more than two thousand dollars. Colbert v. Henley, 64 Miss. 374, 1 So. 631 (1887).

The exemption of a homestead under the section [Code 1942, § 318] attaches to the extent of the value exempt only. State Nat'l Bank v. Lyons, 52 Miss. 181 (1876).

11. Selection of personal property as exempt.

Although an exemption is a personal privilege and as a general rule cannot be taken advantage of, except by the execution or attachment debtor, an exception is that his wife can make the claim for him. Reid v. Halpin, 185 Miss. 396, 188 So. 310 (1939).

Exemptionist may select personal property of $250 in value out of any that he has, regardless of kind or character. Hartfield v. Anderson, 156 Miss. 724, 126 So. 830 (1930).

Where the aggregate value of all of the personal property seized is less than $250 no selection of the particular articles claimed as exempt is necessary. Bank of Gulfport v. O'Neal, 86 Miss. 45, 38 So. 630 (1905).

An exemptionist may select a barrel of whisky, if within the prescribed value. Bernheim v. Andrews, 65 Miss. 28, 3 So. 75 (1887).

12. —Other statutory exemptions in lieu.

Under former enactment of this section (Hemingway's Code, § 1822), wage exemption could be waived, and laborer residing in city, town, or village might hold statutory amount of personal property in lieu thereof. First Nat'l Bank v. Ellison, 135 Miss. 42, 99 So. 573 (1924).

13. Sale or transfer of personal property.

Sale of goods exempt from execution is valid, even though made with intent to defraud seller's creditors. Orgill Bros. v. Gee, 152 Miss. 590, 120 So. 737 (1928).

Evidence held not sufficient to show merchandise sold in gross without complying with law constituted exempt property of seller. Walton v. Walter Fisher Co., 146 Miss. 291, 111 So. 364 (1927).

14. Rights of survivors.

Widow and children of deceased tenant, leaving nothing but exempt property, could, after unsuccessfully demanding tenant's share from landlord, recover in replevin. Williams v. Sykes, 170 Miss. 88, 154 So. 267 (1934), error overruled, 170 Miss. 93, 154 So. 727 (1934).

"Family," in eyes of homestead law, continues to exist so long as widow lives and remains widow. Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

Widow, being entitled to use and occupancy of homestead, was entitled to rents thereof, and would so continue during her life or widowhood unless she elected or consented otherwise. Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

RESEARCH REFERENCES

ALR. Interest of vendee under executory contract as subject to execution, judgment lien, or attachment. 1 A.L.R.2d 727.

Exemption of insurance proceeds as available to assignee of policy. 1 A.L.R.2d 1031.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 A.L.R.2d 515.

Homestead exemption as extending to rentals derived from homestead property. 40 A.L.R.2d 897.

Estate or interest in real property to which a homestead claim may attach. 74 A.L.R.2d 1355.

Effect of divorce on homestead. 84 A.L.R.2d 703.

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 251, 252.

9A Am. Jur. Legal Forms 2d, Homestead §§ 135:11 et seq. (claim of homestead exemption).

§ 85-3-25. Homestead declaration; form; deposit with clerk of chancery court.

Any citizen entitled to a homestead and desiring to select the same and obtain the advantages of such selection, may make a declaration thereof to the following effect, namely:

"The State of Mississippi, Homestead declaration.
County of ________

"I, John Doe [or Nancy Roe], a citizen of said state and county, do declare that I am entitled to a homestead in said county, and that I have selected the same as follows: [Here describe the land and premises. Append plat if desired.]

"Witness my signature, this ________ day of ________, A. D. ________

" ________________ "

The declaration shall be acknowledged or proved as a deed is required to be, and deposited in the office of the clerk of the chancery court for record, in a book to be kept for that purpose, and styled "Homestead Record."

SOURCES: Codes, 1892, § 1972; 1906, § 2148; Hemingway's 1917, § 1823; 1930, § 1767; 1942, § 319.

JUDICIAL DECISIONS

1. In general.
2. Selection of homestead.
3. Separate tracts or lots.

1. In general.

The language of Mississippi Code § 85-3-25 indicates that a homestead declaration is voluntary and not mandatory. Shows v. Watkins, 485 So. 2d 288 (Miss. 1986).

A rural homesteader should ordinarily be entitled to as much as 160 acres for homestead purposes if such an amount of his land is so located as to be truly susceptible of being devoted to homestead purposes as a unit, and without giving the homestead laws an unreasonable application for the protection of the homesteader in that behalf. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

The provisions of this section [Code 1942, § 319] authorizing the filing of a declaration of homestead are prospective, and can have no application in cases of debts contracted before the code became operative. Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898).

2. Selection of homestead.

The husband, as head of the family, may bind the wife by his selection of a homestead if it is in good faith and not for the purpose of defeating her rights. Biglane v. Rawls, 247 Miss. 226, 153 So. 2d 665 (1963).

Where grantor of the timber rights in tract exceeding one hundred sixty acres, to the deed for which timber his wife was not a party, failed to make a declaration of homestead or to petition the court for a designation of homestead, neither such grantor nor the court had the right to fix the allotment of the exempt homestead, the proper procedure in such case being an allotment by commissioners appointed by the court. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

Though a declaration as to a homestead as provided by statute and declaration's recordation are not required in all cases, it is convenient form of giving notice of purpose to return, though parties may not be actually residing thereon. Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

Householder claiming exemption of rural land was limited to $3,000 in value. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

Intention to occupy, coupled with placing of furniture on premises, insufficient to create exemption in absence of declaration. Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922).

A husband who has made a homestead declaration on record designating land of greater value than three thousand dollars, may convey a part thereof before revoking the declaration without his wife's joinder where the remainder of the land equals or exceeds said sum. Nixon v. Hewes, 80 Miss. 88, 31 So. 899 (1902).

The right to select by a statutory declaration belongs solely to the owner of the lands, and where a husband dies without making a selection of homestead by such declaration, the widow has no right to select, but may have an allotment of a homestead as provided by statute (Code 1942, § 323). Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

If a husband had, during his life, selected the homestead, his widow would be confined to such selection. Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

3. Separate tracts or lots.

Neither the cases dealing only with urban property nor those dealing with an urban tract and a rural tract as constituting together one homestead are applicable to a case where rural lands are involved. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

Where a decedent resided on one tract of land and used such tract with another as a farm unit which consisted of less than 160 acres, the widow was entitled to claim both parcels of land as a homestead although they were not contiguous. Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

One claiming city residence as homestead may not also claim 80-acre tract about two and one-half miles from city residence, although value of both does not exceed exemption allowed. Nye v. Winborn, 120 Miss. 1, 81 So. 644 (1919).

If a homesteader lives on a forty-acre tract of land leased by him adjoining that to which he has title, and his farm is in part on both tracts, he may claim an exemption; but the homestead must be laid off just as if he owned the tract on which he resides. Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898).

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Homestead §§ 78-82.

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:309 (waiver of homestead).

§ 85-3-27. Homestead declaration; effect.

The declaration, for not more than one hundred sixty (160) acres, and not exceeding in value Seventy-five Thousand Dollars ($75,000.00); or, if the homestead be in a city, town or village, not exceeding in value Seventy-five Thousand Dollars ($75,000.00) after being filed for record, shall be notice to all persons to be affected thereby; and shall bind the exemptionist, the spouse of the exemptionist if the exemptionist be married, and the creditors of the exemptionist until the exemptionist shall execute and file a new declaration which shall nullify the preceding one, and otherwise have like effect; and shall moreover entitle the exemptionist thereafter to hold the same as exempt to the extent of such value; but subject to contest and legal designation or allotment, if the exemptionist had declared for too much, or has insufficiently or improperly described the premises; and to contest by creditors on the ground that the exemptionist was not entitled to a homestead, and by the spouse of the exemptionist on the ground that it was intended to defraud or circumvent such spouse.

SOURCES: Codes, 1892, § 1973; 1906, § 2149; Hemingway's 1917, § 1824; 1930, § 1768; 1942, § 320; Laws, 1966, ch. 622, § 1; Laws, 1970, ch. 323, § 3; Laws, 1979, ch. 447, § 3; Laws, 1991, ch. 479, § 3; eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.
2. Limitations.
3. Effect of declaration.
4. Notice.

1. In general.

In this section [Code 1942, § 320] the words "was not entitled to a homestead" should not be construed literally; all that is necessary to entitle a judgment creditor to sell a particular tract of land under execution is that the proof show that neither the judgment debtor nor his wife is entitled to claim the specific property as a homestead which is sought to be sold under execution. Adams v. Bounds, 224 Miss. 518, 81 So. 2d 235 (1955).

The provision of this section [Code 1942, § 320] allowing increase of exemption to heads of families who make of record their selection of homestead is beneficent. Chapman v. White Sewing-Mach. Co., 76 Miss. 821, 25 So. 868 (1899).

2. Limitations.

Householder claiming exemption of rural land was limited to $3,000 in value. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

3. Effect of declaration.

The husband, as head of the family, may bind the wife by his selection of a homestead if it is in good faith and not for the purpose of defeating her rights. Biglane v. Rawls, 247 Miss. 226, 153 So. 2d 665 (1963).

A husband who has made a homestead declaration on record designating land of greater value than three thousand dollars, may convey a part thereof before revoking the declaration without his wife's joinder where the remainder of the land equals or exceeds such sum. Nixon v. Hewes, 80 Miss. 88, 31 So. 899 (1902).

If a debtor, in making a homestead declaration, select land in which he has title only to an undivided half interest, he will be bound by the selection. Chapman v. White Sewing-Mach. Co., 77 Miss. 890, 28 So. 749 (1900).

A debtor may select as his homestead one hundred and sixty-five acres of land owned by himself and wife as tenants in common, and such selection is binding on both him and his creditors when the value of the same does not exceed three thousand dollars. Chapman v. White Sewing-Mach. Co., 78 Miss. 438, 28 So. 735 (1900).

4. Notice.

Though a declaration as to a homestead as provided by statute and declaration's recordation are not required in all cases, it is convenient form of giving notice of purpose to return, though parties may not be actually residing thereon. Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

RESEARCH REFERENCES

ALR. Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 A.L.R.5th 221.

Am Jur. 40 Am. Jur. 2d, Homestead §§ 81, 82.

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:309 (waiver of homestead).

§ 85-3-29. Homestead declaration; recording.

The clerk shall file, certify, record, and alphabetically index the declaration, in the same manner as deeds are required to be, and with like effect in all respects, and under like penalties.

SOURCES: Codes, 1892, § 1974; 1906, § 2150; Hemingway's 1917, § 1825; 1930, § 1769; 1942, § 321.

§ 85-3-31. Homestead designated by law when not selected.

The homestead of every citizen entitled to such an exemption who shall not select or who has improperly selected his homestead by declaration, shall be, namely: A tract of land in the form of, first, a square, or second, a parallelogram, if practicable, and composed, if practicable, of contiguous parcels, and including the dwelling house, and, if practicable, the other principal buildings, and not to exceed one hundred sixty (160) acres in area, nor Seventy-five Thousand Dollars ($75,000.00) in value. And in all cases where the homestead may be composed of detached parcels of land, it shall be made up of those nearest the forty (40) acre or other less tract containing the dwelling house.

SOURCES: Codes, 1892, § 1975; 1906, § 2151; Hemingway's 1917, § 1826; 1930, § 1770; 1942, § 322; Laws, 1970, ch. 323, § 4; Laws, 1979, ch. 447, § 4; Laws, 1991, ch. 479, § 4; eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

In an action to determine the validity of a deed to property alleged to be homestead in which grantor's wife did not joint, where the evidence showed that the tract in controversy and a non-contiguous tract upon which grantor's dwelling was located were both used for timber, it was error for the chancellor to hold that the land in controversy was not homestead property, even though he found that the value of the other tract upon which the dwelling house was situated was in excess of the valuation mentioned in the homestead statute. Hendry v. Hendry, 300 So. 2d 147 (Miss. 1974).

Notation on a deed by a husband whose remaining property exceeds that which he may claim as homestead, that the land therein described is no part of his homestead, amounts to a designation of homestead in the remaining property. Biglane v. Rawls, 247 Miss. 226, 153 So. 2d 665 (1963).

A grantor retaining sufficient property to constitute a homestead elects to treat the retained property as a homestead. Biglane v. Rawls, 247 Miss. 226, 153 So. 2d 665 (1963).

Where grantor of the timber rights in tract exceeding one hundred sixty acres, to the deed for which his wife was not a party, failed to make a declaration of homestead or to petition the court for a designation of homestead, neither such grantor nor the court had the right to fix the allotment of the exempt homestead, the proper procedure in such case being an allotment by commissioners appointed by the court. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

The condition of practicability annexed to the preference of one mode of allotment over another under this section [Code 1942, § 322] has reference to the rights and welfare of both the exemptionist and creditors. Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

Under this section [Code 1942, § 322], the allotment shall not necessarily be, first, a square, nor, second, a parallelogram; it need not inevitably include the buildings other than the residence, nor be composed, in any event, of contiguous parcels. Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

§ 85-3-33. Heirs may designate homestead.

In all cases where a deceased person has left a widow or husband, as the case may be, or other heirs at law, then such widow or husband or other heirs at law, or both, who may be entitled by law to inherit from the deceased person, shall be entitled to have the homestead exempt, whether selected, designated or declared for by said decedent in his lifetime or not, and such person or persons so entitled to inherit by law may select, designate or declare for such homestead on or any of the real property of which said decedent died seized and possessed, and have the same set apart to them, or either of them, as the homestead of the decedent.

SOURCES: Codes, 1892, § 1975; 1906, § 2151; Hemingway's 1917, § 1826; 1930, § 1770; 1942, § 322; Laws, 1970, ch. 323, § 4, eff from and after July 1, 1970.

JUDICIAL DECISIONS

1. In general.

In a suit by an heir of deceased grantor to enjoin removal of timber from grantor's homestead under a timber deed which was void as to homestead because the wife of grantor did not sign, where it appeared that the grantor did not specifically designate the 160 acres which constituted the homestead tract out of 300 acre tract covered by deed, and the court should have appointed commissioners under the statute to make the allotment. Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953).

RESEARCH REFERENCES

ALR. Operation and effect of antenuptial agreements to waive or bar surviving spouse's right to probate homestead or surviving family's similar homestead right or exemption. 65 A.L.R.2d 727.

§ 85-3-35. Allotment of homestead; selection of householders or freeholders to set off portion of land.

If the land on which the person claiming the exemption resides exceeds one hundred sixty (160) acres in quantity or Seventy-five Thousand Dollars ($75,000.00) in value, inclusive of improvements, and a proper selection of a homestead has not been made and filed for record, the officer holding an execution against such persons, and not finding other property to satisfy the same, shall levy the execution on the whole land, and shall notify the defendant, if to be found, and the plaintiff or his attorney, if in his county, each to select one (1) householder or freeholder; and each party may select one (1), and inform the officer of his selection, and the officer shall select a third; or, if defendant or plaintiff or his attorney be absent from the county, or if he shall not make a selection, or if the person selected will not act, the officer shall select the three (3) householders or freeholders, who, on oath to be administered by him, shall set off to such person a portion of the land, embracing the dwelling house and outhouses and not exceeding one hundred sixty (160) acres in quantity nor Seventy-five Thousand Dollars ($75,000.00) in value, and the allotment, distinctly indicated by metes and bounds or other sufficient description, shall be returned with the execution; and the levy of the execution shall be dismissed as to the part so allotted; and the officer may advertise and sell the remainder of the land. In making such allotment, the homestead shall be laid off as designated by law in case of the debtor's failure to select his homestead and file his declaration thereof for record.

SOURCES: Codes, 1857, ch. 61, art. 282; 1871, § 2136; 1880, § 1251; 1892, § 1976; 1906, § 2152; Hemingway's 1917, § 1827; 1930, § 1771; 1942, § 323; Laws, 1970, ch. 323, § 5; Laws, 1979, ch. 447, § 5; Laws, 1991, ch. 479, § 5, eff from and after July 1, 1991.

Cross References — Duty of appraisers of estates to set apart exempt property, see § 91-7-117.

Duty of appraisers of estates to report to court, see § 91-7-137.

Power of guardian to purchase home, see § 93-13-38.

JUDICIAL DECISIONS

1. In general.
2. Mode of allotment.
3. Sale of excess.
4. Rights of survivor.

1. In general.

In a proceeding to distribute the surplus fund remaining after a foreclosure sale of real property, the trial court erred in concluding that the defaulting landowners were entitled to a $15,000 homestead exemption where all but one of their creditors had obtained and enrolled judgments against them prior to the effective date of the law increasing the homestead exemption from $5,000 to $15,000; nor did the increased exemption apply to the remaining creditor where its claim was pending on the effective date of the new law. Thus, the $ 15,000 exemption was applicable to all of the creditors' claim. Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n, 369 So. 2d 743 (Miss. 1979).

A householder claiming exemption of rural land sought to be subjected to payment of his debts was limited to 160 acres not exceeding $3,000 in value. Clegg v. Federal Reserve Bank, 169 Miss. 578, 153 So. 812 (1934).

2. Mode of allotment.

In a suit by an heir of deceased grantor to enjoin removal of timber from grantor's homestead under a timber deed which was void as to homestead because the wife of grantor did not sign, where it appeared that the grantor did not specifically designate the 160 acres which constituted the homestead tract out of 300 acre tract covered by deed, and the court should have appointed commissioners under the statute to make the allotment. Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953).

Where grantor of the timber rights in tract exceeding one hundred sixty acres, to the deed for which timber his wife was not a party, failed to make a declaration of homestead or to petition the court for a designation of homestead, neither such grantor nor the court had the right to fix the allotment of the exempt homestead, the proper procedure in such case being an allotment by commissioners appointed by the court. Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938).

Allotment was not void so as to authorize an injunction against an execution sale because of the manner in which sheriff selected freeholders. Edwards Bros. v. Bilbo, 138 Miss. 484, 103 So. 209 (1925).

Where husband had not, during his lifetime, made any selection of homestead in land owned by him, the wife could have an allotment of the homestead as provided in this section [Code 1942, § 323), and the court could not make the allotment. Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

If a homestead in a town exceeds the statutory value, the sheriff cannot select and sell part of it. Rhyne v. Guevara, 67 Miss. 139, 6 So. 736 (1889).

3. Sale of excess.

Excess of proceeds of sale over money secured by trust deed was not exempt from payment of probated claims against deceased's estate, since in ascertaining value of premises claimed as homestead legal encumbrances were not to be deducted. Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937), overruled on other grounds, Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

Where land is levied on under execution and the judgment-debtor has set off a part of it as a homestead the remainder is subject to sale, and he cannot afterwards, and before sale, dispose of the homestead so allotted to him, and move on the other land and claim homestead therein. Richie v. Duke, 70 Miss. 66, 12 So. 208 (1892).

4. Rights of survivor.

Surviving widow entitled to occupy homestead of 160 acres regardless of value and heirs cannot have the property partitioned. Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1908).

Where all the property left by a decedent including money does not equal the exemption to which his widow was entitled, neither the administrator nor any one else can take the money from her or hold her liable for it, no exemption having been set aside to her. O'Brian Bros. v. Wilson, 82 Miss. 93, 33 So. 946 (1903).

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Homestead §§ 37 et seq.

§ 85-3-37. Allotment of homestead; premises not capable of division.

If the premises be not capable of being so divided as to set off the debtor a part, including the dwelling house and not exceeding Seventy-five Thousand Dollars ($75,000.00) in value, inclusive of improvements, or if the debtor has made a valid homestead declaration, and the homestead exceeds Seventy-five Thousand Dollars ($75,000.00) in value, the householders or freeholders shall value the land, inclusive of the dwelling house and buildings; and if the surplus of the valuation, over and above the exempt value, shall, within sixty (60) days, be paid by the execution-debtor, the premises shall not be sold; but if the surplus be not paid within sixty (60) days after the valuation, the officer may advertise and sell the premises, if the same shall bring a greater sum than the exempt value; and out of the proceeds of the sale he shall pay to the execution-debtor the sum of Seventy-five Thousand Dollars ($75,000.00).

SOURCES: Codes, 1857, ch. 61, art. 283; 1871, § 2137, 1880, § 1252; 1892, § 1977; 1906, § 2153; Hemingway's 1917, § 1828; 1930, § 1772; 1942, § 324; Laws, 1970, ch. 323, § 6; Laws, 1979, ch. 447, § 6; Laws, 1991, ch. 479, § 6, eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 324], specifically with respect to the phrase pertaining to the sale of homestead premises "if the same shall bring a greater sum than the exempt value," it is manifest that if the sale does not bring in excess of $3,000 it shall be abandoned and no further proceedings taken, but if it does bring more than $ 3,000 the officer conducting the sale must, out of the proceeds of the sale pay to the execution debtor the sum of

$3,000, encumbrances being deductible in determining such value. Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

The rule of liberal construction prevails with respect to exemption laws of the state, doubtful questions being construed favorably to the homesteader. Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939).

Exemptionist may enjoin levy of execution on homestead claimed to exceed statutory value where provisions of this section [Code 1942, § 324] are not followed; method of valuation cannot be defeated by trial in equity on conflicting evidence, as to value not arrived at in accordance with this section [Code 1942, § 324]. Willis v. Allen, 131 Miss. 264, 95 So. 435 (1923).

§ 85-3-39. Allotment of homestead; how contested by plaintiff.

If, before or after the return of the execution, the plaintiff shall file in the clerk's office from which the execution issued, or before the justice of the peace who issued it, as the case may be, an affidavit that he verily believes the allotment made to the debtor by the freeholders or householders to be incorrect, and the land so allotted by them, or some part of it, to be liable to sale under his execution, a summons shall be issued by the clerk or justice of the peace for the defendant, returnable to the next term of the court, requiring him to appear; and, on return of the summons executed, an issue shall be made up under the direction of the court and tried, as to whether the allotment were correctly and fairly made or not, and, if not, what part of the land ought to be sold under the execution; and, if it be found that any part of the land is subject to be sold, a venditioni exponas shall be issued for the sale of such part, and the plaintiff shall have judgment for costs; but if the issue be found for the defendant, he shall recover costs of the plaintiff.

SOURCES: Codes, 1871, § 2138; 1880, § 1253; 1892, § 1978; 1906, § 2154; Hemingway's 1917, § 1829; 1930, § 1773; 1942, § 325.

Editor's Note — Pursuant to Miss. Constn. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 85-3-41. Allotment of homestead; how contested by defendant.

If a defendant be dissatisfied with the allotment, he may make affidavit before the sale, which affidavit may be made before the officer having the execution, that he verily believes it to be incorrect, specifying wherein he believes it so, and the officer shall suspend the sale of so much as the defendant so claims, and return the affidavit with the execution to the court to which it is returnable; and a summons shall issue for plaintiff, or, if he be a nonresident of this state, for his attorney of record in the case, if he have one; and if he be non-resident, and have no attorney in this state, publication may be made as in other cases; and when the process shall have been returned executed, or publication made, an issue shall be made up, and like proceeding had as when the plaintiff had filed an affidavit of dissatisfaction; and if the issue, in whole or in part, be found in favor of defendant, judgment shall be entered accordingly, and execution may go according to the judgment.

SOURCES: Codes, 1871, § 2139; 1880, § 1254; 1892, § 1979; 1906, § 2155; Hemingway's 1917, § 1830; 1930, § 1774; 1942, § 326.

§ 85-3-43. Homestead liable to debts when debtor ceases to reside thereon.

Whenever the debtor shall cease to reside on his homestead, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed.

SOURCES: Codes, 1871, § 2144; 1880, § 1256; 1892, § 1981; 1906, § 2157; Hemingway's 1917, § 1832; 1930, § 1776; 1942, § 328.

JUDICIAL DECISIONS

1. In general.
2. Abandonment.
3. —Absence.
4. —Removal.

1. In general.

For a judgment debtor to avail himself of the rule that he may successfully interpose his claim of exemption as against the execution creditor at any time before sale under the execution if the debtor has actually got into the occupancy or reoccupancy of the land as a homestead at the time of the sale, the occupancy must be such as will stamp the place claimed as a homestead with the character then and there of an actual and permanent residence of the debtor and his family, and it is not sufficient that it has been made a mere part time lodging place, while the real residence of the family remains elsewhere. Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940).

This section [Code 1942, § 328] allows only a removal which may be justly adjudged as temporary and requires a speedy return as soon as the cause of the absence can be removed. Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940).

Homestead laws are to be liberally construed in favor of debtor; there is no abandonment unless it is clear that exemptionist moved from homestead with intention of not returning. Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).

Ceasing to reside on a homestead renders it liable to debts, unless the removal be temporary by reason of casualty or necessity and with the purpose of speedily reoccupying. Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892).

The word "casualty" refers to accident, while "necessity" may embrace considerations of health, or travel, or public business, or private business emergency of an exceptional and temporary character. Thompson, Lampkin & Co. v. Tillotson, 56 Miss. 36 (1878).

2. Abandonment.

One may claim homestead exemption only in property owned and occupied as residence, and husband abandoned homestead rights when he voluntarily left property without intent to return. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

75-year old homeowner was not divested of his rights to claim homestead exemption by virtue of his conviction for murder and sentence of life imprisonment, despite claim that he was not entitled to the exemption because he had no legal right to occupy the property and that by voluntarily murdering victim he had abandoned any claim to homestead that he would otherwise have. Roberts v. Grisham, 493 So. 2d 940 (Miss. 1986).

Where a husband and wife, having occupied certain property as their homestead, acquired new property intending to live there permanently and make it their homestead, and moved to the new property, vacating the old homestead, the former homestead was not exempt from the claim of a creditor, and the proceeds of the sale of the former homestead which took place 2 weeks after the move to the new property, were not exempt. Patterson v. Adams, 245 So. 2d 13 (Miss. 1971).

The test whether the husband abandoned any homestead rights under statutes invalidating conveyance of the homestead is whether the husband had abandoned the conjugal relation with his wife and the occupancy of the property, but the wrongful ouster of the spouse does not constitute a wilful abandonment; and if a spouse voluntarily separates from the other and abandons the intention of living with him or her through no fault of the latter, he or she has abandoned any homestead rights. Etheridge v. Webb, 210 Miss. 729, 50 So. 2d 603 (1951).

An abandonment of a homestead may be obtained by a free and voluntary separation of the parties and the test is whether the husband was away from the homestead with the mature intention not to return to it. Etheridge v. Webb, 210 Miss. 729, 50 So. 2d 603 (1951).

Evidence that decedent had formerly lived on land, but had ceased to do so for several months before his death, was insufficient to establish homestead. Wright v. Wright, 160 Miss. 235, 134 So. 197 (1931).

Confinement in jail is not abandonment of homestead. Lindsey v. Holly, 105 Miss. 740, 63 So. 222 (1913).

Where the exemptionist abandons a rural homestead and acquires another in town, but finally abandons the latter with the intention of reoccupying the country home, but is prevented by protracted sickness which ended in death, the country home becomes revested with its homestead character and is exempt from his debts. Ross v. Porter, 72 Miss. 361, 16 So. 906 (1895).

3. —Absence.

Absence of seven years occasioned by economic depression and necessity of head of family securing employment elsewhere, with the intention to return when he should earn sufficient money to farm the homestead, constituted an abandonment of homestead where it appeared that the obstacle to returning might never be removed. Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940).

Land, always occupied as homestead by claimant except for about six weeks when she lived with her husband on his father's place, was her homestead although after separating from husband she rented part of land for one year and stayed elsewhere at night but kept one room of the house and a horse and other animals on the land. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

Temporary absence animo revertendi will not constitute an abandonment. Campbell v. Adair, 45 Miss. 170 (1871).

4. —Removal.

Trust deed executed by husband on 63-acre tract was not void on ground that tract constituted a "homestead" where, though tract had formerly been a homestead, husband and wife at time of execution of trust deed lived on a 188-acre tract to which they held title subject to a trust deed, and where removal from 63-acre tract was not occasioned by any casualty or necessity, and there was nothing to indicate that at time of removal there was any intention to return. Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

Recital by husband in trust deed executed by him alone, that land involved was no part of his homestead, was sufficient evidence of his selection of new homestead, when he and wife were, in fact, occupying other land for living purposes, and recordation of such trust deed prevented the parties from acquiring any but subordinate rights in the land. Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

Where husband at time of separation from wife removed from their homestead without intention to return, he thereby abandoned his and his wife's homestead rights therein, though wife remained in possession under color of deed given in settlement of claims for support. Lewis v. Ladner, 177 Miss. 473, 168 So. 281 (1936), error overruled, 177 Miss. 484, 172 So. 312 (1937).

That wife remained in occupancy of homestead abandoned by husband was immaterial as to existence of homestead rights, where by agreeing to a marital separation she consented to his removal. Lewis v. Ladner, 177 Miss. 473, 168 So. 281 (1936), error overruled, 177 Miss. 484, 172 So. 312 (1937).

One going to another state taking his furniture, and obtaining work there, his return being contingent upon obtaining more favorable work near homestead, has ceased to reside on homestead. Bank of Hattiesburg v. Mollere, 118 Miss. 154, 79 So. 87 (1918).

Removal of owner to another state, where he organizes and becomes manager of business with no intention of returning if the business proves successful, is not temporary or by reason of casualty or necessity. Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913).

Moving from homestead to conduct a boarding house in a near-by town with borrowed money secured by mortgage on the homestead was abandonment thereof, although the owner intended to return if she failed to pay for the place moved to. Bennett Bros. v. Dempsey, 94 Miss. 406, 48 So. 901, 136 Am. St. R. 581 (1909).

Owner of country homestead may purchase house in village, move thereto to educate children, qualify as elector and hold municipal office, without forfeiting right to claim country home as exempt, if he keep actual possession in person or by some member of his family, cultivates it, continues to claim it as homestead and intends to return as soon as object of moving to village is accomplished. Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

Where a husband owning a homestead took up his residence in another state, at the direction of his employer, but after being discharged did not return, the removal constituted an abandonment. Salter v. Embrey, 18 So. 373 (Miss. 1895).

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Homestead §§ 172 et seq.

§ 85-3-45. Repealed.

Repealed by Laws, 1979, ch. 447, § 7, eff from and after July 1, 1979.

[Codes, 1880, § 1259; 1892, § 1984; 1906, § 2160; Hemingway's 1917, § 1835; 1930, § 1779; 1942, § 331]

Editor's Note — Former § 85-3-45 pertained to the extent of a wife's homestead exemption.

§ 85-3-47. Property not exempt from execution.

Property shall not be exempt from execution when the purchase-money thereof forms, in whole or in part, the debt on which the judgment is founded; but if the judgment be not in whole for purchase-money, and the execution be levied on property exempt but for the provisions hereof, and the exemptionist pay or tender the amount of purchase-money included in the judgment before sale, the property shall be released; nor shall any property be exempt from sale for nonpayment of taxes or assessments, or for any labor done thereon, or materials furnished therefor, or when the judgment is for labor performed or upon a forfeited recognizance or bail bond.

SOURCES: Codes, 1857, ch. 61, art. 284; 1871, § 2142; 1880, § 1255; 1892, § 1980; 1906, § 2156; Hemingway's 1917, § 1831; 1930, § 1775; 1942, § 327.

Cross References — Owelty being a lien on property, see § 11-21-33.

Requirement of bond of indemnity, see § 13-3-157.

Definition of "purchase money security interest" under Uniform Commercial Code-Secured Transaction, see § 75-9-107.

Secured party filing with respect to purchase money security interest, see § 75-9-301.

Priorities among conflicting security interests in the same collateral, see § 75-9-312.

Mortgage for purchase money of land, see § 89-1-45.

JUDICIAL DECISIONS

1. In general.
2. Judgment for purchase money.
3. Debt for labor.

1. In general.

Court will not ingraft other exceptions on exemption law; exempt property is not subject to execution for alimony. Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).

Homestead is not subject to alimony where children are involved, unless pleadings and decree show necessity for lien thereon. Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).

The object and effect of the section [Code 1942, § 327] is to abolish all exemptions against the specified demands, and this consequence follows regardless of the legal process adopted for the collection of such demands; The test of exemption or non-exemption is not the form of action pursued, but the consideration of the debt due. Ransom v. Duff, 60 Miss. 901 (1883).

2. Judgment for purchase money.

Where a writ of seizure is sued out to take and sell exempt property to recover unpaid purchase money, a judgment-creditor of the defendant herein has no right to intervene and contest the plaintiff's right to a judgment and special execution. Bernheim v. Andrews, 65 Miss. 28, 3 So. 75 (1887).

Homestead exemption cannot be rightfully claimed against a judgment founded on a debt for the purchase-money thereof. Patrick v. Rembert, 55 Miss. 87 (1877).

3. Debt for labor.

The statute provides that property is not exempt "from any labor done thereon, or materials furnished therefor," regardless of whether the debt has been reduced to a judgment or has been enforced through an execution sale. In re Mitchell, 276 B.R. 142 (Bankr. N.D. Miss. 2001).

Conveyance of a homestead by the husband alone in settlement of a claim for labor is governed by Code 1906, § 2159 [Code 1942, § 330] and not by Code 1906, § 2156 [Code 1942, § 327]. Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912).

The judgment of a justice of the peace, in advance of any claim of exemption that, in consequence of any demand for labor performed, all of the defendant's property is liable without benefit of exemption, is a nullity. Eskridge v. Rutland, 77 Miss. 784, 27 So. 610 (1900).

A debt for labor performed in the lifetime of a deceased debtor whose estate is insolvent may, on proper proceedings in the chancery court, after its allowance as to amount by said court, be enforced against the exempt property of his estate, although not reduced to judgment and therefore not within the letter of the statute. Mitchener v. Robins, 73 Miss. 383, 19 So. 103 (1895).

RESEARCH REFERENCES

ALR. Interest of vendee under executory contract as subject to execution, judgment lien, or attachment. 1 A.L.R.2d 727.

Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case. 29 A.L.R.2d 945.

Am Jur. 40 Am. Jur. 2d, Homestead §§ 98 et seq.

§ 85-3-49. Exempt property may be disposed of.

The exempt property, real or personal, disposed of by the owner, shall not by disposal become liable to the debts of the owner; and any debtor leaving this state may take with him his personal property which is exempt from execution.

SOURCES: Codes, 1871, § 2143; 1880, § 1257; 1892, § 1982; 1906, § 2158; Hemingway's 1917, § 1833; 1930, § 1777; 1942, § 329.

Cross References — Nonresidents, absent or absconding debtors, see § 11-31-1. Affidavit for attachment against debtors, see § 11-33-9.

JUDICIAL DECISIONS

1. In general.
2. Residence, requirement of.
3. Conveyance.
4. Sale by land contract.
5. Execution of mortgage.
6. Rights of survivor.

1. In general.

Where a decedent died leaving no surviving spouse, child or grandchild, the homestead exemption expired with her death and was not valid as against unpaid claims against her estate, even though the decedent left a will devising her previously exempt homestead property to her ex-husband; the specific language of § 91-1-21 does not continue a decedent's homestead exemption for anyone other than a surviving spouse, children or grandchildren, and consequently there was no exemptionist who could defeat the claim against the estate's homestead property. Matter of Memorial Hosp. v. Franzke, 634 So. 2d 117 (Miss. 1994).

A homestead may not be subjected to the debts of a decedent. Mills v. Mills, 279 So. 2d 917 (Miss. 1973).

Exemption laws are construed liberally in favor of the owner of the property exempted. Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

Exemptionist may dispose of his exempt property at pleasure and may take it out of the state. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

The policy of the section [Code 1942, § 329] is to free the exempt property from forfeiture to creditors if the debtor sell it; The words "disposed of" are very broad, and include any of the modes by which title may be transmitted. Meacham v. Edmonson, 54 Miss. 746 (1877).

2. Residence, requirement of.

Under this section [Code 1942, § 329], Code 1942, § 333, providing that exemptions shall be allowed in favor of residents of state only, cannot refer to vendees, heirs, or legatees, but to the person to whom exemption right is given. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

3. Conveyance.

Where a homestead is sold by a sale in which the reasonable price paid for the homestead provides no surplus above the amount of the homestead exemption and prior encumbrances, a lien does not follow the property and the proceeds of the sale are exempt. McMillan v. Aru, 773 So. 2d 355 (Miss. Ct. App. 2000).

A lien that predates the sale of a homestead does not become effective if seller leaves the residence before the deed is recorded; once the debtor has executed a deed, there is neither statutory command nor equitable basis for the creditor to gain some advantage because the debtor then moves prior to the filing of the instrument. McMillan v. Aru, 773 So. 2d 355 (Miss. Ct. App. 2000).

Owners who sell a homestead that has judgment liens filed against it must not by the date of sale have established a new homestead; if the homestead owner has not abandoned the old home and made a full-time residence at a new one prior to the date that a deed is executed, the exemption still exists; thus, this section countenances the normal process of selling property, with extra care needing to be shown by the seller not to establish a new homestead until the time that the conveyance is made. McMillan v. Aru, 773 So. 2d 355 (Miss. Ct. App. 2000).

Under the statute, the proceeds of a voluntary sale of a homestead are exempt under all circumstances, regardless of the vendor's continuing to be a householder, or his acquiring another homestead, or the intent with which he keeps the proceeds. Davis v. Lammons, 246 Miss. 624, 151 So. 2d 907 (1963).

Where, at the time the husband conveyed real property to his wife, the parties and their children were residing on the property and had been for a number of years, no new home had been acquired by the husband, and, after the husband had left the city, the wife and the children continued to occupy the property, the property was the homestead of the parties, and the husband had a right to convey to his wife the extent and value of the homestead regardless of his intention toward his creditors. Howell v. General Contract Corp., 229 Miss. 687, 91 So. 2d 831 (1957), suggestion of error overruled, opinion modified, 229 Miss. 687, 93 So. 2d 175 (1957).

Judgment lien does not attach to exempt homestead, and exemptionist can convey homestead unaffected by enrolled judgment. De Bardeleben Coal Corp. v. Parker, 164 Miss. 728, 144 So. 474 (1932), error overruled, 164 Miss. 736, 145 So. 341 (1933).

Where homestead, at time of conveyance, was occupied as such, judgment lien did not extend to it and did not attach thereto when exemptionist moved. De Bardeleben Coal Corp. v. Parker, 164 Miss. 728, 144 So. 474 (1932), error overruled, 164 Miss. 736, 145 So. 341 (1933).

Exemptionist cannot convey land not his homestead free from lien of existing judgment. Bank of Phila. v. Posey, 130 Miss. 530, 92 So. 840 (1922), on suggestion of error, 130 Miss. 825, 95 So. 134 (1923).

Attempt of wife to convey homestead without joinder of husband did not subject it to liability for her debts. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

4. Sale by land contract.

A husband who had been an exemptioner did not lose his right to exemption by a sale of the property after the death of his wife at a time when he was over sixty years of age, nor did the fact that he reacquired the homestead on a rescission of the contract for the sale of the land affect his right to exemption. Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

5. Execution of mortgage.

Execution of a mortgage on exempt property is not a disposal within the meaning of this section [Code 1942, § 329]. Bennett Bros. v. Dempsey, 94 Miss. 406, 48 So. 901, 136 Am. St. R. 581 (1909).

6. Rights of survivor.

It is clearly the purpose of this section [Code 1942, § 329] and Code 1930, § 1765 [Code 1942, § 317] to give the surviving husband or wife who has been an exemptionist, the benefit of the exemption if the survivor is over sixty years of age at the time of the partner's death; to give the right to retain the proceeds of the sale of the homestead, should it be best to sell it. Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

§ 85-3-51. Exemptions allowed to residents only.

The exemptions in this chapter shall be allowed in favor of residents of this state only.

SOURCES: Codes, 1892, § 1986; 1906, § 2162; Hemingway's 1917, § 1838; 1930, § 1781; 1942, § 333.

Cross References — Aliens holding land, see § 89-1-23.

JUDICIAL DECISIONS

1. Residence.
2. Persons subject to residence requirement.

1. Residence.

Mere fact that deceased was non-resident will defeat exemption of bequest of life insurance to resident. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

Only a person who is both a citizen and a resident of this state, as well as a householder having a family, is entitled to a homestead exemption. Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1900); Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913).

2. Persons subject to residence requirement.

This section [Code 1942, § 333] as applied to exemption of the proceeds of insurance payable to decedent's executor or administrator (Code 1942, § 309), cannot refer to vendees, heirs or legatees, but to the person to whom the exemption right is given. Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

RESEARCH REFERENCES

Am Jur. 31 Am. Jur. 2d, Exemptions §§ 238 et seq.

40 Am. Jur. 2d, Homestead § 14.

§ 85-3-52. Judgment or claim of another state or political subdivision for failure to pay income tax on pension or retirement benefits.

(1) A judgment or claim in favor of another state or political subdivision of another state for failure to pay that state's or that political subdivision's income tax on benefits received from a pension or other retirement plan shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state.

(2) As used in this section, "pension or other retirement plan" includes:

(a) An annuity, pension, or profit-sharing or stock bonus or similar plan established to provide retirement benefits for an officer or employee of a public or private employer or for a self-employed individual;

(b) An annuity, pension, or military retirement pay plan or other retirement plan administered by the United States; and

(c) An individual retirement account.

SOURCES: Laws, 1995, ch. 565, § 2, eff from and after July 1, 1995.

Cross References — Enforcement of lien on enrolled judgment generally, see §§ 11-7-191, 11-7-195.

Filing of copies of foreign judgments and effect thereof, see § 11-7-303.

RESEARCH REFERENCES

CJS. 85 C.J.S., Taxation §§ 1209 et seq.

CHAPTER 5

Joint and Several Debtors

Sec.
85-5-1. Effect of releasing one or more joint debtors.
85-5-3. Judgment against one debtor does not affect rights against others.
85-5-5. Repealed.
85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages.

§ 85-5-1. Effect of releasing one or more joint debtors.

In all cases of joint or joint and several indebtedness, the creditor may settle or compromise with and release any one or more of such debtors; and the settlement or release shall not affect the right or remedy of the creditor against the other debtors for the amount remaining due and unpaid, and shall not operate to release any of the others of the said debtors; and all mortgages or securities for the said indebtedness shall remain in full force against the debtors not released, in favor of the creditor, and also in favor of such of the debtors as may be entitled to contribution, payment, or reimbursement from others of said debtors, and the right of payment, contribution or reimbursement, as among themselves, shall not be affected by this section; and if any debtor, so released, shall have paid more than his ratable share of the whole debt, the whole amount paid by him shall be credited, and if less than his ratable share, then the full amount of his ratable share shall be credited, and the other debtors shall be liable for the residue.

SOURCES: Codes, Hutchinson's 1848, ch. 38, art. 11; 1857, ch. 47, art. 1; 1871, § 2263; 1880, § 1003; 1892, § 2352; 1906, § 2682; Hemingway's 1917, § 2169; 1930, § 2027; 1942, § 334.

Cross References — Discontinuance of suit against indorsers of negotiable instruments or against parties secondarily liable thereon, see § 75-13-5.

Law of principal and surety, see §§ 87-5-1 et seq.

Payment extinguishing mortgage, see § 89-1-49.

JUDICIAL DECISIONS

1. In general.
2. Actions against joint or joint and several debtors.
3. —Release-nonjoinder of joint debtors.
4. —Discontinuance of suit as to some but not all.
5. Amount to be credited.

1. In general.

Statute relating to settlement or compromise in cases of joint or joint and several indebtedness is intended to encourage plaintiffs to pursue their claims, while at the same time creating an atmosphere ripe for settlement. McBride v. Chevron U.S.A., 673 So. 2d 372 (Miss. 1996).

Under statute governing compromise and settlement in cases of joint or joint and several indebtedness, when a nonsettling defendant believes it paid more than the jury's apportioned fault, it can seek contribution from settling defendants. McBride v. Chevron U.S.A., 673 So. 2d 372 (Miss. 1996).

This provision does not apply to prevent the release of an indorser of a note from discharging subsequent indorsers. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

While abolishing all distinctions as to remedies upon joint and several obligations, the statute does not abolish distinctions in substance between such obligations. Wisdom v. Guess Drycleaning Co., 5 F. Supp. 762 (S.D. Miss. 1934).

This statute does not enable one to declare upon a joint obligation and recover upon a several one. United States v. Ewing, 19 F.2d 378 (N.D. Miss. 1927).

2. Actions against joint or joint and several debtors.

This section [Code 1942, § 334] did not apply where bank receiver, by court's authority, released first indorser on note payable to bank and sought to collect balance due from second indorser, since second indorser was not a "joint and several debtor." Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

Guarantors jointly executing guaranty were primarily and equally liable to guarantee. Enochs & Flowers, Ltd. v. Roell, 170 Miss. 44, 154 So. 299 (1934).

A mortgagor and his grantee assuming mortgage debt are not joint debtors of the mortgagee within meaning of this statute. Gilliam v. McLemore, 141 Miss. 253, 106 So. 99, 43 A.L.R. 79 (1925).

Where the grantee of a mortgagor recited in the deed that he assumes the mortgage debt, the grantee becomes the principal debtor with the mortgagor as his surety, upon acceptance or ratification by mortgagee. Gilliam v. McLemore, 141 Miss. 253, 106 So. 99, 43 A.L.R. 79 (1925).

Bringing of suit by a mortgagee after material change of status of parties was not an acceptance of mortgagor's grantee as mortgagee's primary debtor. Gilliam v. McLemore, 141 Miss. 253, 106 So. 99, 43 A.L.R. 79 (1925).

Proceeds from life insurance policy on husband's life payable to wife were not exempt from judgment against her on note signed by both as joint makers, since payee had the right to proceed against either one or both of the joint makers until payment was made, notwithstanding as between husband and wife she was a mere surety. Goza v. Provine, 140 Miss. 315, 105 So. 534 (1925).

3. —Release-nonjoinder of joint debtors.

Municipal street paving contractor was not necessary party to suit on his surety bonds for amount due complainant for cement supplied to contractor. Marquette Cement Mfg. Co. v. Fidelity & Deposit Co., 173 Miss. 164, 158 So. 924 (1935).

In action on partnership notes, one partner was not an indispensable party either to rendition of personal judgment against codefendants or to order directing sale of collateral, since defendants' obligation was joint and several, and judgment against some of them would not affect plaintiff's right as to others unless satisfaction was obtained. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711 (1934), error overruled 172 Miss. 36, 159 So. 407.

In a suit in chancery on a guardian's bond against the heirs of a deceased surety thereon, the nonjoinder of the other sureties on the bond or the principal or his legal representative, is not cause for demurrer. Horne v. Tartt, 76 Miss. 304, 24 So. 971 (1898).

In such a suit the heirs of a deceased surety and those holding under him the property of the decedent, are proper parties where the estate has been finally administered. Horne v. Tartt, 76 Miss. 304, 24 So. 971 (1898).

4. —Discontinuance of suit as to some but not all.

Guarantee having sued all guarantors, could properly discontinue action against one without thereby involving res judicata doctrine. Enochs & Flowers, Ltd. v. Roell, 170 Miss. 44, 154 So. 299 (1934).

Discontinuance of a suit against one of two jointly and severally liable guarantors did not affect a creditor's right to hold the remaining guarantor liable for the amount due and unpaid. Woods-Tucker Leasing Corp. v. Kellum, 641 F.2d 210 (5th Cir. 1981).

5. Amount to be credited.

Release of some signers of accommodation note on adequate consideration held to entitle others only to have pro rata shares of released persons credited on note. Yazoo Delta Mtg. Co. v. Harlow, 150 Miss. 105, 116 So. 441 (1928).

RESEARCH REFERENCES

ALR. Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release. 6 A.L.R.5th 883.

Release of joint tortfeasor. 6 A.L.R.5th 883.

Am Jur. 18 Am. Jur. 2d, Contribution §§ 8 et seq.

66 Am. Jur. 2d, Release §§ 35 et seq.

5 Am. Jur. Legal Forms 2d, Compromise and Settlement § 63:66 (compromise with one debtor-judgment to be taken against codebtors).

5A Am. Jur. Legal Forms 2d, Contributions § 69:6 (agreement by parties equally liable to contribute toward common liability).

5A Am. Jur. Legal Forms 2d, Contributions § 69:8 (optional provisions; in release-negating need for contribution between joint tortfeasors).

10A Am. Jur. Legal Forms 2d, Judgments § 157:40 (release of one of several judgment debtors).

CJS. 18 C.J.S., Contribution §§ 10, 11.

76 C.J.S., Release §§ 47, 48, 51.

§ 85-5-3. Judgment against one debtor does not affect rights against others.

In any action founded on a joint or joint and several bond, covenant, bill of exchange, promissory note, or other contract, or on a contract or liability of copartners, it shall be lawful to sue any one or more of the parties liable on such bond, covenant, bill of exchange, promissory note, or other contract or liability; and separate suits may be brought against the representatives of such of the parties as have died, or joint suits may be brought against the representatives of the deceased party and those who are alive and bound therein; and the rendition of judgment against one or more joint or joint and several debtors shall not affect any right of the plaintiff as to the other parties, unless satisfaction has been obtained.

SOURCES: Codes, 1880, § 1134; 1892, § 2353; 1906, § 2683; Hemingway's 1917, § 2170; 1930, § 2028; 1942, § 335.

Cross References — Bringing suits before justices of the peace against two or more defendants who are jointly or jointly and severally liable, see § 11-9-103.

Joint liability of sureties on a claimant's bond for trial of right of property, see § 11-23-21.

Attachment against one or more of joint debtors, see § 11-33-3.

Attachments against nonresidents jointly indebted, see § 11-33-7.

Joint and several liability on a negotiable instrument, see § 75-3-118.

Suits on indorsed bills and notes, see § 75-13-3.

JUDICIAL DECISIONS

1. In general.
2. Actions against joint or joint and several debtors.
3. —Pleadings.
4. —Necessary and proper parties.
5. —Discontinuance as to some but not all.
6. —Proof.

7. —Judgment.
8. Settlements.

1. In general.

This provision does not apply to prevent the release of an indorser of a note from discharging subsequent indorsers. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

While abolishing all distinctions as to remedies upon joint and several obligations, the statute does not abolish distinction in substance between such obligations. Wisdom v. Guess Drycleaning Co., 5 F. Supp. 762 (S.D. Miss. 1934).

Statute relating to liability of surety on sheriff's bond held not in conflict with statute relating to recovery against sureties generally. State ex rel. Weems v. United States Fid. & Guar. Co., 157 Miss. 740, 128 So. 503 (1930).

Statute abolishes common law rule that all persons jointly liable on contract, express or implied, must be sued jointly. J.B. White's Garage, Inc. v. Boyd, 149 Miss. 383, 115 So. 334 (1928).

This section [Code 1942, § 335] abolishes all distinctions in remedies upon joint and several obligations and makes them all joint and several. Steen v. Finley, 25 Miss. 535 (1853).

2. Actions against joint or joint and several debtors.

Contract for legal services between attorney and clients for recovery of property whereby clients assigned percentage of recovery to attorney in payment for services is considered separable from invalid contract by wife to pay attorney for services rendered by him for wife in recovery of her separate property, and hence, interest assigned to attorney by clients was liable to be subjected to claim of bank to whom attorney had pledged fee in consideration of renewal of a note. Martin v. First Nat'l Bank, 176 Miss. 338, 164 So. 896 (1936).

Proceeds from life insurance policy on husband's life, payable to wife, were not exempt from judgment against her on note signed by both as joint makers, since payee had the right to proceed against either one or both of the joint makers until payment was made, notwithstanding as between husband and wife she was a mere surety. Goza v. Provine, 140 Miss. 315, 105 So. 534 (1925).

Under this section [Code 1942, § 335] the separate property of a nonresident member of a firm domiciled in this state may be attached by firm creditors on the ground of such nonresidence, notwithstanding statutory provision making partnership property liable to attachment where grounds, other than nonresidence, exist against either partner. Cohen v. Gamble, 71 Miss. 478, 15 So. 236 (1894).

3. —Pleadings.

This provision does not enable one to declare upon a joint obligation and recover upon a several one. United States v. Ewing, 19 F.2d 378 (N.D. Miss. 1927); Kimbrough v. Ragsdale, 69 Miss. 674, 13 So. 830 (1892).

4. —Necessary and proper parties.

In a proceeding in chancery court to enforce a bond for child support against one surety thereon, a co-surety was not a necessary party. Box v. McKnight, 215 So. 2d 409 (Miss. 1968).

Municipal street paving contractor was not a necessary party to suit on his surety bonds for amount due complainant for cement supplied to contractor. Marquette Cement Mfg. Co. v. Fidelity & Deposit Co., 173 Miss. 164, 158 So. 924 (1935).

In action on partnership notes, one partner was not an indispensable party either to rendition of personal judgment against codefendants or to order directing sale of collateral, since defendants' obligation was joint and several, and judgment against some of them would not affect plaintiff's right as to others unless satisfaction was obtained. Enochs-Flowers, Ltd. v. Bank of Forest, 172 Miss. 36, 157 So. 711 (1934), error overruled 172 Miss. 36, 159 So. 407.

Where county and town jointly made contract for grading street, landowner could sue contractor and town for damages for change of grade without joining county. J.B. White's Garage, Inc. v. Boyd, 149 Miss. 383, 115 So. 334 (1928).

In an action on administrator's bond for misappropriation of funds after final decree plaintiff need not make the administrator a party defendant. Davis v. State, 118 Miss. 577, 79 So. 764 (1918).

5. —Discontinuance as to some but not all.

Where the jury found in an action against joint debtors that the attachment on a truck was rightfully sued out but that a garnishment against the bank account of one of the defendants was wrongfully sued out, the dismissal of the garnishment did not release the sureties from liability on their bond to produce the truck, inasmuch as the defendant against whom the garnishment was dismissed was not discharged as a party to the action as to the attachment issue but only as to the debt issue in which the sureties had no interest. Davis v. Shemper, 210 Miss. 208, 50 So. 2d 143 (1951).

Guarantors jointly executing guaranty held primarily and equally liable to guarantee who, having sued all guarantors, could properly discontinue action against one without thereby involving res judicata doctrine. Enochs & Flowers, Ltd. v. Roell, 170 Miss. 44, 154 So. 299 (1934).

Under the provisions of this statute as formerly enacted that "every joint bond, covenant, bill, or promissory note" shall be deemed and construed to have the same effect in law as a joint and several bond, covenant, bill, or promissory note, and that it shall be lawful to sue out process and proceed to judgment against any one of the obligors, covenantors or drawers of such bond, covenant, bill, or promissory note, in the same manner as if the same were joint and several," the same license which gave to a party the power of instituting a suit against one or more of the parties to an undertaking carries with it by necessary implication the right to prosecute or discontinue it in the same sense and to the same extent and degree. Coffee v. Planters Bank, 54 U.S. 183, 14 L. Ed. 105 (1851).

6. —Proof.

Where defendant sued as a partner denies the existence of the partnership under oath, it becomes necessary that plaintiff prove such partnership. Wise v. Cobb, 135 Miss. 673, 100 So. 189 (1924).

7. —Judgment.

The obligations of partners are joint and several and a judgment may be rendered against one partner where the suit is against both, and a judgment against all partners where the evidence authorizes judgment against only one will be reversed in part and affirmed in part. Wise v. Cobb, 135 Miss. 673, 100 So. 189 (1924).

Under this section [Code 1942, § 335] suit may be brought against one or more persons jointly and severally liable; partners are thus liable and an error in rendering judgment against several partners, two of whom were not served and did not appear, will not require reversal of the judgment as to the partner who was served, for the reason that one appealing party is not entitled to a reversal for an error as to another. Hattiesburg Hdwe. Co. v. Pittsburg Steel Co., 115 Miss. 663, 76 So. 570 (1917).

A judgment against one partner unsatisfied is not a bar to an action against another partner. Hyman, Lichenstein & Co. v. Max Stadler & Co., 63 Miss. 362 (1885); Scharff v. Noble, 67 Miss. 143, 6 So. 843 (1889).

8. Settlements.

Under Mississippi law, nonsettling defendant, which was found 50% liable for patient's death in medical malpractice action, was responsible for $100,000 of $200,000 verdict and was not entitled to credit for $650,000 settlement which plaintiff had reached during trial with another defendant; crediting nonsettling defendant with settlement would undermine intention of jury to hold nonsettling defendant accountable and would violate public policy. Krieser v. Baptist Mem. Hosp.-N. Miss., 984 F. Supp. 463 (N.D. Miss. 1997).

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Judgments §§ 495 et seq.

59 Am. Jur. 2d, Parties §§ 153 et seq.

15 Am. Jur. Pl & Pr Forms (Rev) Judgments, Forms 301, 302 (judgments against joint debtors and joint and several debtors).

CJS. 49 C.J.S., Judgments §§ 30 et seq.

50 C.J.S., Judgments §§ 758, 759.

§ 85-5-5. Repealed.

Repealed by Laws, 1989, ch. 311, § 6, eff from and after July 1, 1989. [Codes, 1942, § 335.5; Laws, 1952, ch. 259]

Editor's Note — Former § 85-5-5 related to contribution between joint tort feasors. For comparable provisions, see § 85-5-7.

§ 85-5-7. Limitation of joint and several liability for damages caused by two or more persons; contribution between joint tortfeasors; determination of percentage of fault; liability of medical defendants for economic and noneconomic damages.

(1) As used in this section, "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as otherwise provided in subsection (4) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

(3) Nothing in this section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly noted herein.

(4) Joint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it. Any person held jointly and severally liable under this section shall have a right of contribution from his fellow defendants acting in concert.

(5) In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor.

(6) Nothing in this section shall be construed to create a cause of action. Nothing in this section shall be construed, in any way, to alter the immunity of any person.

SOURCES: Laws, 1989, ch. 311, § 1; Laws, 2002, 3rd Ex Sess, ch. 2, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 3; Laws, 2004, 1st Ex Sess, ch. 1, § 6, eff from and

after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

Editor's Note — Section 7 of ch. 311, Laws of 1989, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

Laws of 2004, 1st ex. sess., ch. 1, § 20, provides:

"SECTION 20. Sections 8 through 15 of this act shall take effect and be in force from and after January 1, 2007; the remainder of this act shall take effect and be in force from and after September 1, 2004, and Sections 1 through 7 of this act shall apply to all causes of action filed on or after September 1, 2004.

JUDICIAL DECISIONS

I. Under § 85-5-7.

1. In general.
2. Burden of proof.
3. Instructions to jury.
4. Parties.
5. Joint and several damages.
6. Miscellaneous.

7-10. [Reserved for future use.]

II. Under former § 85-5-5.

11. In general.
12. Right to indemnification.
13. Miscellaneous.

I. Under § 85-5-7.

1. In general.

Trial court's finding that the city was 100 % liable for driver's injuries, caused when the driver was involved in a motor vehicle accident with a police car during a pursuit, was supported by sufficient evidence, including testimony that the police car did not have its lights or sirens on when entering the intersection. City of Jackson v. Spann, 4 So. 3d 1029 (Miss. 2009).

Mississippi law does not require apportionment of fault, Miss. Code. Ann. § 85-5-7(1), (7), to a plaintiff absent evidence sufficient to show, at least, negligence on the plaintiff's part, Miss. Code. Ann. § 11-7-15. Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475 (5th Cir. 2008).

Trial court improperly apportioned liability in a case in which a lessor sought to recover for damages to his building in a construction accident, finding the lessee 50 percent at fault, a general contractor 30 percent at fault, and a sub-contractor 20 percent at fault under Miss. Code Ann. § 85-5-7; the trial court improperly found that the lessee negligently performed its duties as architect because the construction contract was silent as to the duties of an architect and, absent a delineation of such duties, no duty to warn could be imputed to the lessee. Family Dollar Stores of Miss., Inc. v. Montgomery, 946 So. 2d 426 (Miss. Ct. App. 2006).

Where a mother filed suit against a school district and a bus driver to recover damages after the mother's child was hit by a school bus, Miss. Code Ann. § 85-5-7(7) did not apply because the case did not involve joint tortfeasors; hence, the trial court did not err in failing to allocate fault to the mother because the mother had dropped the child off for school across the street from the school. Jackson Pub. Sch. Dist. v. Smith, 875 So. 2d 1100 (Miss. Ct. App. 2004).

Trial court properly applied a credit against judgment for amount received in settlement from entities not party to the litigation because the case involved multiple defendants, all alleged to have acted purposely and in concert to injure a customer by depriving him of the rightful possession of his vehicle and forcing him into a situation where he felt compelled to purchase a replacement vehicle on terms he could not afford. Brown v. N. Jackson Nissan, Inc., 856 So. 2d 692 (Miss. Ct. App. 2003).

Pursuant to the Mississippi Supreme Court, Miss. Code Ann. § 85-5-7 provides for contribution only in cases where a joint judgment is obtained among the parties.

Travelers Prop. & Cas. Co. v. City of Greenwood Fire Dep't, 441 F. Supp. 2d 776 (N.D. Miss. 2006).

Though the Mississippi Department of Transportation was not immune from suit, as the trial court properly found that a five to six inch drop-off on the shoulder of a road was a dangerous condition that was not obvious, which was created by the negligence of the Department and of which the Department knew but failed to warn against, the trial court erred by not assessing some degree of fault to plaintiff driver, who had been obliged to exercise vigilant caution when she learned the road was under construction. Miss. DOT v. Trosclair, 851 So. 2d 408 (Miss. Ct. App. 2003).

Allocation of fault to immune employers is consistent with Miss. Code Ann. § 85-5-7 and is required, provided that they are not held liable for damages. Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107 (Miss. 2003).

To the extent that Accu-Fab & Construction, Inc. v. Ladner, 778 So. 2d 766 (Miss. 2001), may be construed as stating that immune parties may not be assessed fault (as opposed to liability) under Miss. Code Ann. § 85-5-7, that opinion is overruled. Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107 (Miss. 2003).

In a wrongful death action, the trial court erred by allocating the defendants' liability for the fault attributed to an immune employer as well as their joint and several liability to reach the 50 percent goal proportionately in accordance with the jury allocation of fault to them respectively. Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107 (Miss. 2003).

The trial court erred in applying Miss. Code Ann. § 85-5-7(2)-(3) (1999) as the statute abolished joint and several liability when a defendant was more than 50 percent liable, and the driver and the manufacturer were found to be 54 percent liable. Classic Coach, Inc. v. Johnson, 823 So. 2d 517 (Miss. 2002).

Trial court erroneously instructed the jury to allocate fault to a statutory employer, and the settlement reached in a wrongful death/product liability case should not have been credited before the proportionate damage amounts were calculated respecting the non-settling defendants. Yale Materials Handling Corp. v. Brandon, — So. 2d —, 2002 Miss. LEXIS 180 (Miss. May 23, 2002), dismissed by, opinion withdrawn by 2003 Miss. LEXIS 21 (Miss. Jan. 16, 2003), appeal dismissed by 2003 Miss. LEXIS 47 (Miss. Jan. 16, 2003).

Because an employer and an employee were to be considered one defendant when the liability was caused by the employee, as provided by Miss. Code Ann. § 85-5-7(3), it was not reversible error for a jury instruction not to allow the jury to apportion fault between those parties pursuant to Miss. Code Ann. § 85-5-7(7); in any event, two jury instructions taken together gave the jury an opportunity to find for those parties if it was so inclined. Coho Res., Inc. v. McCarthy, 829 So. 2d 1 (Miss. 2002).

The statute's apportionment provision only applies to damages incurred due to negligence; the statute does not apply to a breach of contract. Cooper Indus., Inc. v. Tarmac Roofing Sys., 276 F.3d 704 (5th Cir. 2002).

The collective joint and several liability of all defendants contributing to a loss is 50 percent; in other words, the statute does not authorize a prevailing plaintiff to recover 50 percent of his award from each defendant. Narkeeta Timber Co. v. Jenkins, 777 So. 2d 39 (Miss. 2000).

Any tortfeasor, even absent ones, that contributed to the injury at issue must be considered by the jury when apportioning fault. Peterson v. Ladner, 785 So. 2d 290 (Miss. Ct. App. 2000).

Responsibility may not be allocated between intentional and negligent participants in the events that caused injury; the statute does not contemplate that a willful contribution to an injury be allocated just as is negligence. Dawson v. Townsend & Sons, 735 So. 2d 1131 (Miss. Ct. App. 1999).

Participants in an event who for some reason are not joined in the litigation, so-called "phantom defendants," can nonetheless have their portion of fault assigned to them; a jury may not be instructed to consider only the parties actually sued, else the defendants who are present have been unfairly denied the benefits of the system of comparative fault. Dawson v. Townsend & Sons, 735 So. 2d 1131 (Miss. Ct. App. 1999).

In an action alleging conversion and violations of state securities laws, the trial court did not deny the defendants of their right to allocate liability pursuant to this section when it refused to allow the defendant to proceed simultaneously with its claims against others and failed to allow joinder of an individual. First Investors Corp. v. Rayner, 738 So. 2d 228 (Miss. 1999).

The term "party," as used in subsection (7) of this section, refers to any participant to an occurrence that gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial. Estate of Hunter v. GMC, 729 So. 2d 1264 (Miss. 1999).

Where fault has been apportioned between settling and non-settling defendants, then, notwithstanding the settlement, the non-settling defendant remains liable for the amount of damages allocated to him in direct proportion to his percentage of fault. Krieser v. Hobbs, 166 F.3d 736 (5th Cir. 1999).

The term "fault," as used in subsection (1), does not include intentional torts; thus, in an action against a store for injuries sustained in a crime which was allegedly caused by its failure to provide adequate security in its parking lot, the store's percentage of fault was 100 percent since the persons who committed the crime had no "fault." Whitehead v. Food Max, Inc., 163 F.3d 265 (5th Cir. 1998).

Department of Transportation had sovereign immunity on claim for indemnification by ambulance service that was sued for injuries sustained by motorist when oncoming ambulance struck her car at intersection, allegedly after department's flagman flagged her to proceed with left turn. Mississippi Transp. Comm'n v. Jenkins, 699 So. 2d 597 (Miss. 1997).

Sovereign immunity applies to actions where state is possible joint tort-feasor. Mississippi Transp. Comm'n v. Jenkins, 699 So. 2d 597 (Miss. 1997).

It was not necessary to join Mississippi city as "phantom party" defendant in suit by city employee alleging injury as result of corporation's release of certain substances into city sewer system, so that jury could fully apportion fault under § 85-5-7 even though plaintiff could not sue city directly and corporation could not seek contribution from city, as result of mandate of § 71-3-9. Statute did not contain clear command that alleged joint-tortfeasors be joined in such a way. White v. Esmark Apparel, Inc., 788 F. Supp. 907 (N.D. Miss. 1992), aff'd, 44 F.3d 1005 (5th Cir. 1995).

Employer who is immune to tort action by employee under workers' compensation law is not rendered amenable to such suit by § 85-5-7 which requires apportionment of liability among joint tortfeasors; subsection (8) specifically precludes this section from creating new cause of action. Stringfellow v. Reed, 739 F. Supp. 324 (S.D. Miss. 1990).

2. Burden of proof.

Supreme Court agreed that a physician in a medical malpractice suit raised an affirmative defense regarding the apportionment of damages, but failed to present sufficient evidence to create a genuine issue of material fact that would have attributed negligence to a third party. A partial summary judgment for the wife, who was the decedent's survivor, was proper. Eckman v. Moore, 876 So. 2d 975 (Miss. 2004).

In a wrongful death case, a court properly granted partial summary judgment to plaintiff on the issue of apportionment where the doctor's rebuttal evidence did not indicate any fault attributable to a third party. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

3. Instructions to jury.

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because, although the representative argued that the trial court should have given the jury an apportionment instruction pursuant to Miss. Code Ann. § 85-5-7, she had previously stated in a discovery response that no heir had exacerbated the decedent's mental illness. In arguing for an apportionment instruction, the representative provided no other theory as to how an heir could have been held partially responsible for the suicide and the representative's discovery response was binding on her. Young v. Guild, 7 So. 3d 251 (Miss. 2009).

In a personal injury products liability lawsuit, when the jury instructions that were given were read as a whole, there was no error by the trial court regarding the form of the verdicts. Proper apportionment instructions were given to the jury, Miss. Code Ann. § 85-5-7(7) (now found at § 85-5-7(5)). Goodyear Tire & Rubber Co. v. Kirby, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. Apr. 21, 2009), appeal dismissed by, writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

In a suicide wrongful death case against a doctor, plaintiff waived her claim that the court should have given the jury an apportionment instruction due to the fact that the doctor put forth evidence that the decedent's husband and other family members caused the decedent to commit suicide because plaintiff stated in a discovery response that no heir had exacerbated the decedent's mental illness, and plaintiff provided no other theory as to how an heir could be held partially responsible for the suicide. Young v. Guild, — So. 2d —, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), substituted opinion at, opinion withdrawn by 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

In a medical malpractice case stemming from the death of a patient who was misdiagnosed with cancer and who succumbed from an overdose of pain medication administered by hospice personnel in accordance with the instructions of defendant doctor, the trial court did not err in failing to instruct the jury on the allocation of fault because the doctor failed to establish that defendant medical center, a settling defendant, actually took part in the doctor's decision to switch the patient's medication or to establish the dosage. Causey v. Sanders, 998 So. 2d 393 (Miss. 2008).

In a negligence case, the trial court erred in not instructing the jury to apportion some fault to an employer, even though the employer was immune from liability under the workers' compensation law. Coho Res., Inc. v. Chapman, 913 So. 2d 899 (Miss. 2005).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, the jury was directed to allocate fault between the drivers under Miss. Code Ann. § 85-5-7; the jury's verdict for the commercial driver was supported by substantial evidence, because reasonable minds could have differed as to liability. White v. Stewman, 932 So. 2d 27 (Miss. 2006).

Jury was obligated to determine a minor driver's percentage of fault, who had reached a settlement, irrespective of his status as a party at the time of trial; jury was entitled to know that, up until the settlement, plaintiffs and defendants were claiming that the minor driver was at fault for the accident and brought suit against him seeking a recovery for the same. Smith v. Payne, 839 So. 2d 482 (Miss. 2002).

It was reversible error for the trial court to instruct the jury in such a manner so as to refuse to allow it to consider the negligence of a settling defendant in apportioning fault for injuries sustained by the plaintiff in an accident between an animal drawn wagon and a motor vehicle. Peterson v. Ladner, — So. 2d —, 2000 Miss. App. LEXIS 303 (Miss. Ct. App. June 27, 2000), opinion withdrawn by, substituted opinion at 785 So. 2d 290, 2000 Miss. App. LEXIS 531 (Miss. Ct. App. 2000).

The instruction offered by the plaintiffs for determining whether the defendant's negligence in any way caused the plaintiff's injuries satisfied this section since the instruction merely stated that the jury should find that the plaintiff was entitled to recover from the defendant if it found that the defendant's negligence in any way caused her injuries. Fielder v. Magnolia Bev. Co., 757 So. 2d 925 (Miss. 1999).

4. Parties.

Plaintiff was not at fault, Miss. Code. Ann. § 85-5-7(1), (7), because it "assumed the risk" associated with bonding a project by making a decision to proceed with a "high risk surety" situation; plaintiff could not have fully appreciated or voluntarily assumed the complete risk of its decision to bond a project; therefore, plaintiff could not have its recovery reduced based on assumption of risk theory. Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475 (5th Cir. 2008).

Wrongful death action against medical defendants and a casino should not have been severed because such severance violated the requirement in Miss. Code Ann. § 11-7-13 of "one suit for the same death," and was also inconsistent with Miss. Code Ann. § 85-5-7. Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652 (Miss. 2007).

Under Mississippi's center of gravity analysis as to how the conduct of receivers of defunct insurance companies affected a corporation's liability, N.Y. C.P.L.R. § 1601 was applicable rather than Miss. Code Ann. § 85-5-7; thus, the corporation was not entitled to apportionment of fault for negligence-based claims brought by the receivers because the injury occurred primarily in New York as the corporation's headquarters and Mississippi had little or no interest in protecting the nonresident corporation. Dale v. ALA Acquisitions I, Inc., 434 F. Supp. 2d 423 (S.D. Miss. 2006).

Because an employer and an employee were to be considered one defendant when the liability was caused by the employee, as provided by Miss. Code Ann. § 85-5-7(3), it was not reversible error for a jury instruction not to allow the jury to apportion fault between those parties pursuant to Miss. Code Ann. § 85-5-7(7); in any event, two jury instructions taken together gave the jury an opportunity to find for those parties if it was so inclined. Coho Res., Inc. v. McCarthy, 829 So. 2d 1 (Miss. 2002).

In the absence of a contractual relationship between a mortgage borrower's insurer and a mortgage lender's insurer, Miss. Code Ann. § 85-5-7 barred the borrower's insurer from seeking contribution from the lender's insurer of pro rata amounts paid by the borrower's insurer for fire damage to the borrower's property. Hill v. General Ins. Co. of Am., 456 F. Supp. 2d 757 (N.D. Miss. 2006).

Trial court did not abuse its discretion in severing an employee prior to a wrongful death trial; even had the employee not been severed, the employee would not have had any separate liability apart from the employer because an employee was considered one with the employer pursuant to Miss. Code Ann. § 85-5-7(3), which prevented the apportionment of damages between them. Coho Res., Inc. v. McCarthy, 829 So. 2d 1 (Miss. 2002).

Fault may not be allocated to employers who are immune from liability by virtue of the workers' compensation law. Mack Trucks, Inc. v. Tackett, — So. 2d —, 2001 Miss. LEXIS 40 (Miss. Feb. 22, 2001), opinion withdrawn by, substituted opinion at, remanded by 2001 Miss. LEXIS 285, CCH Prod. Liab. Rep. P16216 (Miss. Oct. 25, 2001).

In an action against a general contractor and a subcontractor arising from the death of an iron worker while constructing a casino on a barge on a navigable waterway, the defendants were not entitled to have another subcontractor that employed the decedent considered as a party for apportionment of damages since the decedent's employer was in the unique position of having no fault pursuant to the federal Longshore and Harbor Workers' Compensation Act. Accu-Fab & Constr., Inc. v. Ladner by & Through Ladner, 970 So. 2d 1276 (Miss. Ct. App. 2000), aff'd, 778 So. 2d 766 (2001).

5. Joint and several damages.

Tire manufacturer's claims against a dealer and guarantors for fraud, negligent misrepresentation, and breach of contract were dismissed rather than stayed under 9 U.S.C.S. § 3 pending arbitration or mediation because the fraud claims allegedly arose from or were directly related to the parties relationship and within the scope of an arbitration agreement and allegations against the guarantors were based on joint and several liability under Miss. Code Ann. § 85-5-7(4) and their unconditional guarantees. Bridgestone Firestone N. Am. Tire, LLC. v. J&J Tire Co., LLC., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 8594 (S.D. Miss. Feb. 5, 2009).

Court erred by failing to address the apportionment of fault between joint tortfeasors in a suit by plaintiffs against the city for injuries sustained during a police chase because it was unclear whether the court assessed plaintiffs' total damages in an amount greater than the judgment, and accordingly reduced the award by a percentage of fault assessed to the chase suspect, or if it determined the total damages suffered by plaintiffs and assessed no percentage of fault to the suspect. City of Ellisville v. Richardson, 913 So. 2d 973 (Miss. 2005).

Where defendant hospital was dismissed from a medical negligence suit on the basis of the statute of limitations, the jury was permitted to consider the hospital's negligence in rendering its decision regarding the fault of the remaining defendants. The trial court did not err in denying plaintiffs' motion for directed verdict regarding the allocation of fault. Blailock v. Hubbs, 919 So. 2d 126 (Miss. 2005).

Even though an employer of a decedent was immune from suit, it was proper to allocate a portion of the fault to the employer in an action against an electric company for wrongful death by electrocution from the company's power lines. Ware v. Entergy Miss., Inc., 887 So. 2d 763 (Miss. 2003).

Statute saved for the injured plaintiff joint and several collection rights to the extent of allowing recovery of fifty percent of the damages; it preserved immunities and defenses and left for interpretation the question of which if any nonparties could be considered for allocation of fault. Mack Trucks, Inc. v. Tackett, — So. 2d —, 2001 Miss. LEXIS 285 (Miss. Oct. 25, 2001), opinion withdrawn by, substituted opinion at, remanded in part by 841 So. 2d 1107, 2003 Miss. LEXIS 135 (Miss. 2003).

In an action arising from a motor vehicle accident in which the trial court found that the plaintiff, the defendant, and two persons not party to the suit were each responsible for 25 percent of the plaintiff's damages, the court incorrectly ordered the defendant to pay 25 percent of the total damages; the statute required that the defendant pay 50 percent of the the plaintiff's recoverable damages, that is, 50 percent of 75 percent of the total damages, or 37.5 percent of the total damages. DePriest v. Barber, 798 So. 2d 456 (Miss. 2001).

6. Miscellaneous.

In a products liability action alleging three welding rod manufacturers' failure to warn, the fact that the professional welder was exposed or overexposed to fumes from welding consumables manufactured by two nonparty manufacturer's did not affect the legitimacy of the jury's verdict against the three named manufacturers, as there was no factual or legal requirement that, in order to recover at trial, the harm caused to the professional welder by his exposure to welding fumes be caused only, or even mostly, by the three manufacturers' products; although the three manufacturers argued to the jury that the presence of the nonparty manufacturers' welding products in the workplace was relevant to causation, they never asked the court to instruct the jury to allocate fault to the nonparty manufacturers. The three manufacturers certainly knew how to ask for such an allocation, as they cited Miss. Code Ann. § 85-5-7 and asked the court to allocate fault to the professional welder's employer; but whatever their reasons for not seeking allocation of fault against the nonparty manufacturers, there was sufficient evidence at trial that the products manufactured by each of the three manufacturers were a proximate cause of harm to the professional welder, and the fact that the nonparty manufacturers might have proximately caused those same indivisible injuries was not a valid basis for the three manufacturers' postverdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). Jowers v. BOC Group, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. Apr. 1, 2009), vacated in part by 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

7-10. [Reserved for future use.]

II. Under former § 85-5-5.

11. In general.

Under Miss. Code Ann § 85-5-7(3), a county was only liable for the portion of fault assigned to it with regard to the damages awarded to a passenger mother as the other portion of fault was assigned to a car driver. Callahan v. Ledbetter, 992 So. 2d 1220 (Miss. Ct. App. 2008).

In a case in which an insurer and a company sought contribution from a fire department for workers' compensation benefits paid to a career fireman, the fire department's Fed. R. Civ. P. 12 motion to dismiss was granted because the insurer and the company asserted a cause of action for contribution for workers' compensation benefits which had long been recognized as not existing under Mississippi law absent a joint judgment among the parties. Travelers Prop. & Cas. Co. v. City of Greenwood Fire Dep't, 441 F. Supp. 2d 776 (N.D. Miss. 2006).

This section was inapplicable to a wrongful death action in which defendant, as one of the alleged tortfeasors, was sued alone. Hood v. Dealers Transp. Co., 472 F. Supp. 250 (N.D. Miss. 1979).

In accordance with the policy established under this section, contribution between joint judgment debtors would be pro rata based upon the number of defendants rather than on the percentage of liability attributable to defendants. Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316 (Miss. 1977).

The first paragraph of this section [Code 1942, § 335.5] created a new Mississippi rule that joint tortfeasors are to share equally. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

The effect of this statute is to create rights which did not exist before and destroyed a valid defense to an action for contribution which was available before the enactment of this statute. Klaas v. Continental S. Lines, 225 Miss. 94, 82 So. 2d 705 (1955).

In a wrongful death case, a trial court erred in awarding a new trial on the issue of damages because it should not have reallocated fault from an immune employer to an electric company. Entergy Miss., Inc. v. Hayes, 874 So. 2d 952 (Miss. 2004).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, the issue submitted to the jury was whether the commercial driver and his employer were negligent in the operation of the vehicle; because the jury rendered a verdict that defendants were not liable, the jury was not required to answer questions on the verdict form pertaining to the allocation of fault. White v. Stewman, 932 So. 2d 27 (Miss. 2006).

The second paragraph of this section [Code 1942, § 335.5] tells how to count the joint tortfeasor defendants who are to share in the contribution. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

The proviso in the second paragraph of this section [Code 1942, § 335.5] places a ceiling on the liability of a principal or employer so that he (or his insurer) is not exposed to the risk of contributing twice, once for his agent's wrong and once for his own responsibility imposed by respondeat superior. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

In a situation where the proviso set forth in the second paragraph of this section [Code 1942, § 335.5] is inapplicable, the first paragraph of the section requires that the defendants against whom judgment is rendered shall share equally the obligation imposed by the judgment. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

Where an agent was not the subject of a judgment entered against his principal, the principal runs no risk of paying twice, and the proviso in the second paragraph of this section [Code 1942, § 335.5] is inapplicable. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

There is nothing in the statute to indicate that the legislature intended to make the new law apply to judgments rendered before its effective date. Klaas v. Continental S. Lines, 225 Miss. 94, 82 So. 2d 705 (1955).

The use of the word "is" in a clause providing that "any action for damages where judgment is rendered against two or more defendants jointly and severally," although it usually denotes present tense but by reason of the context the meaning of this word appears to have a future signification. Klaas v. Continental S. Lines, 225 Miss. 94, 82 So. 2d 705 (1955).

12. Right to indemnification.

One insurance company was entitled to contribution from another insurance company where both were liable for accruing interest and cost of litigation, and one would be unjustly enriched if other's payment were to relieve it of liability; because either insurance company could have been forced to pay entire cost, they had "common liability" for purposes of contribution. Nichols v. Anderson, 837 F.2d 1372 (5th Cir. 1988).

An electric utility company was guilty of active negligence in failing to elevate a power line after it became aware that as a result of the land beneath the line being filled in, the line was dangerously lower than the height required in safety regulations, and the utility was not entitled to noncontractual implied indemnity from an employer, also actively negligent, for damages which the employer suffered as a result of settling with the heirs of an employee who was electrocuted while operating equipment which came in contact with the line. Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970).

Although there is no right of contribution where the parties are joint tortfeasors or are in pari delicto, parties are not in pari delicto when one party does the act or creates a dangerous situation and the other party is liable because of passive negligence in failing to remedy the defect causing an injury, or because of a nondelegable statutory duty. Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968).

A city, by law under a nondelegable duty to maintain its streets and sidewalks in a reasonably safe condition, cannot be considered in pari delicto with a contractor who, with the consent of the municipality, dug a ditch into which a pedestrian fell and was injured; and the city was entitled to indemnification from the contractor for all sums which it paid in settlement of the pedestrian's claim, including court costs and attorneys' fees. Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968).

13. Miscellaneous.

Where two chemical companies failed to refute an expert's affidavit that contamination had not come from a toilet company or result from a migration of contaminates over its property, summary judgment was properly granted in favor of the toilet company, and the opportunity for allocation of fault was not unfairly prejudiced. Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc., 873 So. 2d 103 (Miss. 2004).

Defendant in action by city employee for injuries sustained in car accident while employee was on duty cannot maintain third-party action against city for contribution under Miss Code Anno § 85-5-5, as employee may not recover in tort against his employer due to exclusivity provisions of § 71-3-9. McClellan v. Poole, 692 F. Supp. 687 (S.D. Miss. 1988).

In an action by an insurer that had previously unsuccessfully defended its insured in a wrongful death action arising out of an automobile accident, alleging that the gas explosion responsible for the underlying death was caused by a design defect in decedent's car and seeking to recover a portion of the judgment entered against its insured from defendants, the manufacturer of decedent's car and the dealership that sold it to him, defendants' motion to dismiss would be sustained where contribution among joint tortfeasors was available only when judgment was rendered against them jointly and severally and where neither defendant had been a party to the original lawsuit. Hartford Accident & Indem. Co. v. Mitchell Buick-Pontiac & Equip. Co., 479 F. Supp. 345 (N.D. Miss. 1979).

The settlement by a railroad company with the estate of a petroleum tank truck driver killed in a crossing accident did not constitute a release on the part of the company of its rights against the driver's estate, thereby releasing the company's right of contribution under this section [Code 1942, § 335.5] against the driver's principals. Standard Oil Co. v. Illinois Cent. R.R., 421 F.2d 201 (5th Cir. 1969).

Where plaintiffs brought an action against city and a landowner, among others, for injury sustained when a tree fell upon their automobile, and the landowner entered his appearance but filed no defensive pleadings, an order of the trial court sustaining demurrer to an amended petition had the effect of finally dismissing plaintiff's entire suit upon the failure to plead further within the time allowed, and finally disposed of the case as to the landowner, and neither Code 1942, § 1156, nor Code 1942, § 335.5, precluded plaintiff's appeal from the trial court's action. Barron v. City of Natchez, 229 Miss. 276, 90 So. 2d 673 (1956).

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Right of tortfeasor to contribution from joint tortfeasor who is spouse or otherwise in close familial relationship to injured party. 25 A.L.R.4th 1120.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors. 71 A.L.R.4th 1108.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment. 72 A.L.R.4th 231.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release. 6 A.L.R.5th 883.

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CHAPTER 7

Liens

Liens on Crops, Advances, Lumber, Timber, Foals, Calves and Water Craft 85-7-1
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LIENS ON CROPS, ADVANCES, LUMBER, TIMBER, FOALS, CALVES AND WATER CRAFT

Sec.	
85-7-1.	Employer and employees; lien on crops.
85-7-3.	Sawmill employees and timber men; lien on lumber and timber.
85-7-5.	Owner of stallion, jackass, or bull; lien on foal or calf.
85-7-7.	Water craft; work, materials, supplies, etc.
85-7-9.	Water craft; municipal dockage, wharfage, or anchorage charges.

§ 85-7-1. Employer and employees; lien on crops.

(1) Every employer shall have a lien on the share or interest of his employee in any crop made under such employment, for all advances of money, and for the fair market value of other things advanced by him, or anyone at his request, for supplies for himself, his family and business during the existence of such employment, which lien the employer may offset, recoup, or otherwise assert and maintain.

(2) Every employee, laborer, cropper, part owner, overseer or manager, or other person who may aid by his labor to make, gather, or prepare for sale or market any crop, shall have a lien on the interest of the person who contracts with him for such labor for his wages, share or interest in such crop, whatever may be the kind of wages or the nature of the interest, which lien such employee, laborer, cropper, part owner, overseer or manager, or other person may offset, recoup or otherwise assert and maintain.

(3) Except as provided in subsection (4) of this section, any lien arising under the provisions of this section shall be paramount to all liens and encumbrances or rights of any kind created by or against the person so contracting for such assistance when perfected in accordance with Uniform Commercial Code Article 9 — Secured Transactions (Section 75-9-101 et seq.), except the lien of the lessor of the land on which the crop is made, for rent and

supplies furnished, as provided in the chapter on "Landlord and Tenant," appearing as Chapter 7 of Title 89, Mississippi Code of 1972.

(4) Any lien arising under the provisions of subsection (2) of this section in favor of any person other than an employee, laborer, cropper, part owner, overseer or manager as to crops or the proceeds thereof shall be effective against a third party only for a period of twenty-one (21) days from and after the time the labor is completed, unless within such period of time the lien is perfected in accordance with Uniform Commercial Code Article 9 — Secured Transactions (Section 75-9-101 et seq.). Any such lien in favor of any person other than an employee, laborer, cropper, overseer or manager which has not been perfected within the twenty-one-day period as herein provided shall, upon subsequent perfection of such lien, have the priority as against a third party to which a perfected security interest may be entitled under Uniform Commercial Code Article 9 — Secured Transactions (Section 75-9-101 et seq.).

SOURCES: Codes, 1880, § 1360; 1892, § 2682; 1906, § 3042; Hemingway's 1917, § 2400; 1930, § 2238; 1942, § 336; Laws, 1894, ch. 71; Laws, 1985, ch. 492; Laws, 2001, ch. 495, § 33, eff from and after Jan. 1, 2002.

Cross References — Requirement of paying employees twice a month, see §§ 71-1-35, 71-1-53.

Warehouseman's lien, see §§ 75-7-209, 75-7-210.

Carrier's lien, see §§ 75-7-307, 75-7-308.

Investment security issuer's lien, see § 75-8-103.

Exclusion of certain liens from operation of Uniform Commercial Code governing secured transactions, see § 75-9-104.

Place of filing to perfect security interest under Article 9 of Uniform Commercial Code, see § 75-9-401.

Enforcement of lien of state under the Petroleum Products Inspection Law, see § 75-55-37.

Lien of innkeepers on baggage, see § 75-73-15.

Requirement that tenants' goods not be removed until rent is paid, see § 89-7-1.

Tenant's remedy against landlord, see § 89-7-115.

JUDICIAL DECISIONS

1. Persons entitled to lien.
2. Property subject to lien.
3. Priority of liens.
4. Enforcement of lien.
5. Assignment of lien.
6. Waiver of lien.

1. Persons entitled to lien.

Ginner who gins and bales cotton for market has lien thereon for his charges. Quiver Gin Co. v. Looney, 144 Miss. 709, 111 So. 107 (1927); Irwin v. Miller, 72 Miss. 174, 16 So. 678 (1894); Duncan v. Jayne, 76 Miss. 133, 23 So. 392 (1898).

Overseer has lien for wages under contract of employment where wrongfully discharged, less earnings elsewhere. Langford v. Leggett, 99 Miss. 266, 54 So. 856 (1911).

It was held prior to the amendment in the law of 1894, incorporated above, that the overseer of the farm, in making a crop, had a lien for his wages. Weise v. Rutland, 71 Miss. 933, 15 So. 38 (1894); Powell v. Smith, 74 Miss. 142, 20 So. 872 (1896).

An employee on one plantation who merely for a few days supervises laborers sent therefrom to another plantation of his employer is not a laborer on the other plantation entitled to a lien on the crops grown thereon. Terry v. Groves, 71 Miss. 539, 14 So. 451 (1893).

One employed as a wage hand and general laborer, and who aids in producing, gathering and ginning cotton grown on the plantation, has a lien on the cotton for his wages for all work done by him as a general laborer, including labor having no reference to the cotton. Lumbley v. Thomas, 65 Miss. 97, 5 So. 823 (1887).

2. Property subject to lien.

Section 85-7-1 limits priority or paramount lien to crop for which labor was supplied; thus, while plaintiff may have been able to claim priority or paramount lien on cotton grower's 1982 crop, the year in which services were performed, it has no priority lien by virtue of statute on cotton grower's 1985 crop; furthermore, statute makes no provision for priority lien for supplier of materials such as fertilizer or chemicals and is limited in its application to suppliers of labor only. Flora Compress & Whse. Co. v. Virden, 642 F. Supp. 466 (S.D. Miss. 1986).

Where tenant was authorized to sell crop free from share croppers' liens and to turn buyers' checks over to landlord for collection, who was to turn back to tenant amounts due croppers to be turned over to them, such amounts were impressed with trust in hands of landlord, who knew funds constituted croppers' shares, and could not be applied on tenant's note notwithstanding tenant's consent thereto. Jackson v. Jefferson, 171 Miss. 774, 158 So. 486 (1935).

3. Priority of liens.

A ginner has a lien superior to all other liens for his services where the preparation of the cotton for market is not otherwise provided for by the landlord or other interested party. Duncan v. Jayne, 76 Miss. 133, 23 So. 392 (1898).

A ginner to whom cotton is delivered by the owner, and who gins the same, has a lien for his charges paramount to all others except that of the landlord. Irwin v. Miller, 72 Miss. 174, 16 So. 678 (1894).

4. Enforcement of lien.

Since 11 U.S.C.S. § 546(b)(1)(A) recognized the effectiveness of state statutes which permit certain creditors to perfect a lien within a specified period of time that then takes priority over the existing liens of other creditors, the automatic bankruptcy stay thus did not apply under 11 U.S.C.S. § 362(b)(3) even though a creditor perfected its statutory crop lien for cotton ginning services one day after bankruptcy petitions were filed. In re Crosthwait Cotton & Planting Co., — Bankr. —, 2003 Bankr. LEXIS 784 (Bankr. N.D. Miss. July 3, 2003).

The lien of an employee may be enforced against a purchaser of agricultural products, whether he buys with or without notice, and the burden is not on the plaintiff to show that he did not consent to the sale. Powell v. Smith, 74 Miss. 142, 20 So. 872 (1896).

5. Assignment of lien.

The lien of a laborer is assignable. Kerr v. Moore, 54 Miss. 286 (1876).

6. Waiver of lien.

Where tenant was authorized to sell crop free from share croppers' liens and to turn buyers' checks over to landlord for collection, who was to turn back to tenants amounts due croppers to be turned over to them, croppers' liens, though waived as to buyers of crops, were not waived as to proceeds in hands of tenant or landlord. Jackson v. Jefferson, 171 Miss. 774, 158 So. 486 (1935).

Lien of assistant manager of plantation may be waived by course of dealing showing consent to disposition of crop. Williams v. Delta Grocery & Cotton Co., 159 Miss. 575, 132 So. 732 (1931).

Course of dealing between assistant manager of plantation and owner for several years held to constitute waiver of former's lien on crop. Williams v. Delta Grocery & Cotton Co., 159 Miss. 575, 132 So. 732 (1931).

Ginner's lien may be waived by course of dealings between parties. Quiver Gin Co. v. Looney, 144 Miss. 709, 111 So. 107 (1927).

Ginner turning over gin receipts received on delivery of cotton to compress waived his lien thereon. Quiver Gin Co. v. Looney, 144 Miss. 709, 111 So. 107 (1927).

Where the manager of a plantation ships cotton to be sold in the market of a neighboring town, he waives his lien under this section [Code 1942, § 336], and cannot maintain a suit against a factor who had received the cotton of the consignee and sold it, applying the proceeds to the credit of the plantation or its owner. McCormick v. Blum, 75 Miss. 81, 21 So. 707 (1897).

RESEARCH REFERENCES

ALR. Bailee's lien for work on goods as extending to other goods of the bailor in his possession. 25 A.L.R.2d 1037.

Sufficiency of notice, claim, or statement of mechanic's lien with respect to description or location of real property. 52 A.L.R.2d 12.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Am Jur. 7 Am. Jur. Legal Forms 2d, Crops § 80:81 (lessor's lien on lessee's interest in crops and pasturage).

§ 85-7-3. Sawmill employees and timber men; lien on lumber and timber.

Every employee or laborer of an employer engaged in the operation of a sawmill or planing mill or in cutting and shipping or rafting timber shall have a lien on all such lumber and timber for his wages due by such employer in preference to all other debts of the said employer; but such lien shall take effect as to purchases or incumbrances for a valuable consideration without notice thereof only from the time of commencing judicial proceedings to enforce the lien, and unless such proceedings have been begun the said lien shall expire six (6) months after the claim is due.

SOURCES: Codes, Hemingway's 1917, §§ 2415, 2416, 2417; 1930, § 2240; 1942, § 338; Laws, 1908, ch. 131; Laws, 1922, ch. 282.

Cross References — Warehouseman's lien, see §§ 75-7-209, 75-7-210.

Carrier's lien, see §§ 75-7-307, 75-7-308.

Investment security issuer's lien, see § 75-8-103.

Exclusion of certain liens from operation of Uniform Commercial Code governing secured transactions, see § 75-9-104.

Salvage of abandoned logs, see §§ 89-17-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Persons entitled to lien.
3. Property subject to lien.
4. Priority of liens.
5. Enforcement of lien.

1. In general.

"Employee" includes a larger class than "laborer." Hinton & Walker v. Pearson, 142 Miss. 50, 107 So. 275 (1926).

2. Persons entitled to lien.

Person employed by operator of sawmill to haul logs owned by another for sawing under contract was not entitled to lien for services. Held v. Surber, 158 Miss. 799, 131 So. 420 (1930).

One merely furnishing teams for hauling logs is not an "employee or laborer" entitled to lien. Weeks v. Seale, 143 Miss. 222, 108 So. 505 (1926).

Persons hauling lumber to railroad were "employees" entitled to lien. Hinton & Walker v. Pearson, 142 Miss. 50, 107 So. 275 (1926).

3. Property subject to lien.

Lien on timber for labor or services exists only on timber of laborers' employer, thereby excluding lien on that not owned by employer. Held v. Surber, 158 Miss. 799, 131 So. 420 (1930).

Evidence as to ownership of lumber on which lien was claimed was sufficient to go to jury. Broadus v. Calhoun, 139 Miss. 28, 103 So. 808 (1925).

4. Priority of liens.

Lien on lumber of operator of sawmill of employees for wages is superior to that of one who sold the logs and let the mill to operator. O'Quinn v. Grace, 143 Miss. 655, 109 So. 672 (1926).

5. Enforcement of lien.

Employees of sawmill have concurrent lien on employer's lumber enforceable in chancery by all in one suit. Cooley v. Tullos, 115 Miss. 268, 76 So. 263 (1917).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. Legal Forms 2d, Liens 165:19 et seq. (notices).

§ 85-7-5. Owner of stallion, jackass, or bull; lien on foal or calf.

The owner of a stallion, jackass or bull shall have a lien on each foal begotten by his stallion or jackass, and on each calf begotten by his bull, for the price agreed to be paid therefor, and such lien shall be prior to all other incumbrances on such foal or calf and shall bind the same even in the hands of subsequent purchasers and encumbrancers for a valuable consideration without notice; but the said lien shall expire twelve months after the birth of said foal or calf unless within that time judicial proceedings have been begun to enforce the lien. If the owner shall have falsely represented the breeding, registration, or pedigree of his stallion, jackass or bull, by advertisement or otherwise, he shall not have a lien on the foal begotten by such stallion or jackass, or on the calf of such bull, as against any person who acted under the belief that such representation was true; and, in such case, the owner of the animal shall not have any claim for the service of the stallion, jackass, or bull.

SOURCES: Codes, 1880, § 1394; 1892, §§ 2716, 2717, 2718; 1906, §§ 3076, 3077, 3078; Hemingway's 1917, §§ 2439, 2440, 2441; 1930, § 2241; 1942, § 339; Laws, 1888, p. 90; Laws, 1934, ch. 312; Laws, 1936, ch. 295.

Cross References — Exclusion of certain liens from operation of Uniform Commercial Code governing secured transactions, see § 75-9-104.

RESEARCH REFERENCES

ALR. Contracts for breeding horses. 34 A.L.R.5th 651.

§ 85-7-7. Water craft; work, materials, supplies, etc.

There shall be a lien on all ships, steamboats and other water craft for work done or materials supplied by any person in this state for or concerning the building, repairing, fitting, furnishing, supplying or victualing such ships, steamboats or other water craft, and for the wages of the persons employed on board such vessel, boat, or craft, for work done or services rendered, in preference to all other debts due and owing from the owners thereof. The said lien shall expire six (6) months after the claim is due, unless judicial proceedings have been commenced to assert it.

SOURCES: Codes, 1880, § 1395; 1892, § 2725; 1906, § 3085; Hemingway's 1917, §§ 2445, 2447; 1930, § 2242; 1942, § 340.

Cross References — Warehouseman's lien, see §§ 75-7-209, 75-7-210.

Carrier's lien, see §§ 75-7-307, 75-7-308.

Exclusion of certain liens from operation of Uniform Commercial Code governing secured transactions, see § 75-9-104.

Effect of writ of execution for the sale of steamboat or watercraft, see § 85-7-53.

Recording of contract for construction, alteration, or repair of boat or watercraft, see § 85-7-139.

Salvage of abandoned boats, see §§ 89-17-1 et seq.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 340] does not abrogate common-law right of lien for services in repair of boat in possession of repairer. Kornosky v. Hoyle, 97 Miss. 562, 52 So. 481 (1910).

Debts for materials, supplies and labor created in the performance of a contract to repair a ship are not liens on the vessel, under this section [Code 1942, § 340], when they were created by an independent contractor who was in no sense an agent of the ship owner. Valverde v. Spottswood, 77 Miss. 912, 28 So. 720 (1900).

§ 85-7-9. Water craft; municipal dockage, wharfage, or anchorage charges.

(1) There shall be a lien on all skiffs, yachts, and other water craft in favor of any municipality operating a small craft or yacht harbor or basin for dockage, wharfage or anchorage charges for space or anchorage contracted for by the water craft or its owner or agent where the charge for such space or anchorage is made for a period of time without regard to the actual time such skiff, yacht or other water craft is actually docked or anchored to the dock, wharf, or at the mooring place in the basin. Such lien shall be paramount to all other debts due and owing by such water craft, or the owner thereof, or other lien thereon, except as provided by Section 85-7-7.

(2) The lien, by this section provided, shall be enforced as provided by Sections 85-7-31 through 85-7-53, inclusive.

SOURCES: Codes, 1942, § 340-01; Laws, 1946, ch. 290, §§ 1, 2.

Cross References — Municipal piers and bathhouses, see § 21-37-13.

Municipal harbors and wharves, see § 21-37-15.

Warehouseman's lien, see §§ 75-7-209, 75-7-210.

Carrier's lien, see §§ 75-7-307, 75-7-308.

Exclusion of certain liens from operation of Uniform Commercial Code governing secured transactions, see § 75-9-104.

Municipal dockage, wharfage, or anchorage charges, see § 85-7-9.

RESEARCH REFERENCES

Am Jur. 79 Am. Jur. 2d, Wharves § 34.

SUITS TO ENFORCE LIENS ON CROPS, ADVANCES, LUMBER, TIMBER, FOALS, CALVES AND WATER CRAFT

Sec.
85-7-31. Commencement of suit.
85-7-33. Non-resident or unknown parties.
85-7-35. Precedents.
85-7-37. Affidavit.
85-7-39. Writ; form.
85-7-41. Writ; where returnable.
85-7-43. Writ; when returnable.
85-7-45. Writ; return to wrong court not to affect the case.
85-7-47. Replevy of property seized.
85-7-49. Issue and judgment.
85-7-51. Death of party not to abate suit.
85-7-53. Sale of steamboat or water craft and its effect.

§ 85-7-31. Commencement of suit.

A person having any lien in Sections 85-7-1 through 85-7-9 may enforce the same by making affidavit before any officer authorized to administer oaths of any county where the subject-matter of the lien may be, describing therein the property sought to be subjected, setting forth his claim, share or interest therein, and asserting his lien thereon, with an itemized account of his demand, and giving the names of the persons interested therein, and of those, if any, who have a like or other claim or interest in such property; whereupon the clerk or justice shall issue a writ directed to the proper officer and returnable to the proper court, commanding the officer to seize the property, or so much thereof as may be necessary to satisfy the plaintiff's demand and costs, and to summon the persons named in the affidavit as interested therein, to appear in the court designated, at the time fixed, to answer the complaint.

SOURCES: Codes, 1880, §§ 1363, 1364; 1892, § 2684; 1906, § 3044; Hemingway's 1917, § 2402; 1930, § 2243; 1942, § 341.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Attachment of perishable commodities, see §§ 11-1-43 et seq.

Replevin, attachment, and lien proceedings before justices of the peace, see § 11-9-135.

Arbitration of controversies arising out of construction contracts and related agreements, and failure of arbitration to effect liens, see § 11-15-101.

Writ to seize property and subsequent proceedings thereto, see § 11-21-77.

Enforcement of lien which is upon an animal, see § 69-13-21.

Selling of hotel guest's baggage, see § 75-73-17.

How and when lien is enforced, see § 85-7-141.

Seizure of ward's property which is about to be removed by guardian, see § 93-13-65.

JUDICIAL DECISIONS

1. Persons entitled to enforce lien.
2. Affidavit, sufficiency of.
3. —Amendment of.
4. —Itemized account.
5. Evidence.

1. Persons entitled to enforce lien.

A Mississippi court could not adjudicate or judicially establish a mechanic's lien against a tractor not situated within the boundaries of the state; under state law, a proceeding to establish a mechanic's lien is a proceeding in rem against the property and not a proceeding in personam, even though the owner must be named as a party to the suit. Crawler Parts, Inc. v. Laclede Land & Livestock Co., 374 So. 2d 798 (Miss. 1979).

Where purchaser of a car under a retained title contract incurred a bill for repairs which was necessary for preservation and the operation of the automobile and to prevent its deterioration, the mechanic was entitled to enforce a mechanic's lien which was superior to the rights of the seller who repossessed the car upon a default on the contract. Commercial Sec. Co. v. Kriner, 53 So. 2d 92 (Miss. 1951).

One who makes oral sale and delivery of a motor on credit, without retaining title to, or lien upon, motor to secure purchase price, has a statutory lien under Code 1942, § 337 upon motor as security for debt which vests him with right to have property seized by officer and for personal judgment for his demand and for sale of property through processes of court to satisfy his demand. Runnels v. Fairchild, 204 Miss. 287, 37 So. 2d 312 (1948).

The assignee of a laborer's lien may enforce it in the same manner and to the same extent as the laborer. Kerr v. Moore, 54 Miss. 286 (1876).

2. Affidavit, sufficiency of.

Proceeding for seizure of property on which seller had purchase-money lien was not invalid because affidavit for seizure was made before officer in another state, since statute, providing that person having purchase-money lien "can enforce same" by making affidavit before proper officer of county where subject-matter of lien may be, is not mandatory. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337 (1936).

Proceeding for enforcement of purchase-money lien was not invalid because seller did not show notary public, before whom affidavit of seizure which was made in Ohio was taken, had authority to take and certify affidavits, since court would take judicial notice of Ohio law authorizing notary public to administer and certify oaths. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337 (1936).

In proceeding to enforce seller's purchase-money lien brought in justice court and appealed to circuit court, permitting seller to file, in circuit court, affidavit for writ of seizure was proper although, because of amount involved, circuit court would not have had original jurisdiction. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337 (1936).

The justice before whom the affidavit was made, and who failed to affix his signature, may affix his name thereto in open court after motion to dismiss the case for want of an affidavit. Hartsell v. Myers, 57 Miss. 135 (1879).

3. —Amendment of.

County court's allowance of an amendment to correct the description of certain tires and tubes and making the description applicable to both the declaration and the affidavit, was proper exercise of its discretion in light of the fact that the defendants were not prejudiced. Hannan Motor Co. v. Darr, 212 Miss. 870, 56 So. 2d 64 (1952).

The affidavit may be amended by adding the names of others interested with the affiant. May v. Williams, 61 Miss. 125, 48 Am. R. 80 (1883).

4. —Itemized account.

Where the defendant contested the claim of mechanic's lien on a truck and also objected that the account was not properly itemized, but filed no pleadings questioning the account and the defendant did not follow the statute as to the methods of contesting claims, and the answer of the defendant in effect admitted the correctness of the amount, the defendant waived any objection. Hannan Motor

Co. v. Darr, 212 Miss. 870, 56 So. 2d 64 (1952).

An itemized account is unnecessary where the affidavit filed by a laborer to enforce his lien for wages contains as full information as could be given by the filing of an independent paper, and his claim rests upon a contract for a definite sum per month and does not consist of items. Baldwin v. Morgan, 73 Miss. 276, 18 So. 919 (1895).

5. Evidence.

In proceeding to enforce purchase-money lien for unpaid balance due on an accounting machine for use of business establishment, evidence that salesman misrepresented machine and that purchasers received offer to buy machine from third party, who, upon being told by seller that it would not recognize proposed purchase, refused to complete the transaction, held inadmissible to contradict terms of contract providing that it could not be changed by oral agreement and that machine could not be sold without consent of seller. Parker v. McCaskey Register Co., 177 Miss. 347, 171 So. 337 (1936).

RESEARCH REFERENCES

ALR. Architect's services as within mechanics' lien statute. 31 A.L.R.5th 664.

Am Jur. 51 Am. Jur. 2d, Liens §§ 83 et seq.

53 Am. Jur. 2d, Mechanics' Liens §§ 333 et seq.

CJS. 53 C.J.S., Liens §§ 46, 50 et seq.

§ 85-7-33. Non-resident or unknown parties.

If any party in interest be a non-resident of the state, or his whereabouts be unknown, he may be made a party to the suit and be proceeded against as in case of suits by attachment against such persons.

SOURCES: Codes, 1880, § 1370; 1892, § 2690; 1906, § 3050; Hemingway's 1917, § 2408; 1930, § 2244; 1942, § 342.

Cross References — Remedy of attachment, see §§ 11-33-1 et seq.

RESEARCH REFERENCES

ALR. Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 A.L.R.2d 471.

Am Jur. 51 Am. Jur. 2d, Liens § 86.

§ 85-7-35. Precedents.

Affidavits and writs in the form of the following precedents shall be sufficient in cases of employer and employee, and in other cases the form shall vary so as to conform to the facts.

SOURCES: Codes, 1880, § 1373; 1892, § 2693; 1906, § 3053; Hemingway's 1917, § 2411; 1930, § 2245; 1942, § 343.

§ 85-7-37. Affidavit.

"State of Mississippi, ________ County

“Before me, ______, a justice of the peace of the said county, ______ makes oath that he was employed by ______ during the year A. D. ______, as a laborer, and as such, and under his employment, assisted to make a crop of cotton and corn, which yielded ______ bales of cotton and ______ bushels of corn, which are now in the possession of ______, and the same is at ______, in said county; and that affiant is, by his contract and services, entitled to one-half of said cotton and corn, the same being of the value of ______ dollars, which the said ______ withholds from him [or whatever may be the claim]. Affiant claims a lien on all of said cotton and corn for the recovery of his share or interest therein, and that ______ and ______ claim a like lien thereon. Affiant prays process according to law.

“______________”

“Sworn to and subscribed before me, the ______ day of ______, A. D.

“______________, J. P.”

SOURCES: Codes, 1880, § 1374; 1892, § 2694; 1906, § 3054; Hemingway's 1917, § 2412; 1930, § 2246; 1942, § 344.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 85-7-39. Writ; form.

“The State of Mississippi.

“To any lawful officer of ______ county:

“We command you forthwith to take into your possession and dispose of, according to law, ______ bales of cotton and ______ bushels of corn, now in the possession of ______, believed to be at ______, in your county, as it is said, or so much thereof as will be sufficient to satisfy the claim of ______, who asserts an interest therein to the extent of one-half thereof, which he avers is of the value of ______ dollars [or who claims a lien thereon for ______ dollars, alleged to be due him for his wages as a laborer in producing said articles, or whatever the claim may be, as set forth in the affidavit], for his labor in producing said articles, and summon the said ______ [and any others shown by the affidavit to have an adverse claim to said articles] to appear before the undersigned, a justice of the peace of said county, at ______, on ______, the ______ day of ______ A. D. ______, at ______ o'clock, ______.M., to answer said claim, and have this writ there then.

“Witness my hand, the ______ day of ______, A. D. ______.

“______________, J. P.”

SOURCES: Codes, 1880, § 1375; 1892, § 2695; 1906, § 3055; Hemingway's 1917, § 2413; 1930, § 2247; 1942, § 345.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 85-7-41. Writ; where returnable.

The writ shall be returnable before the justice of the peace who issued it or some other justice of the peace, if the principal of the sum claimed does not exceed Two Hundred Dollars ($200.00), and, if it does, it shall be returnable to the circuit court; and in such case the affidavit shall be filed, by the officer who issued the writ, in the office of the clerk of the circuit court, on or before the return day of the writ.

SOURCES: Codes, 1880, § 1365; 1892, § 2685; 1906, § 3045; Hemingway's 1917, § 2403; 1930, § 2248; 1942, § 346.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

JUDICIAL DECISIONS

1. In general.

The jurisdiction of the court is determinable by the amount demanded and not by the value of the property seized. May v. Williams, 61 Miss. 125, 48 Am. R. 80 (1883).

RESEARCH REFERENCES

ALR. Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner. 52 A.L.R.3d 797.

§ 85-7-43. Writ; when returnable.

The writ, when returnable before a justice of the peace, may be made returnable at any time which will give the parties in interest five (5) days' notice before trial; and when returnable to the circuit court, it may be executed at any time before the first day of the term, and the cause shall be triable at such term.

SOURCES: Codes, 1880, § 1366; 1892, § 2686; 1906, § 3046; Hemingway's 1917, § 2404; 1930, § 2249; 1942, § 347.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 85-7-45. Writ; return to wrong court not to affect the case.

If the writ be made returnable to the wrong court, the case shall not be dismissed nor affected thereby, but shall be transferred to the proper court, and the cause shall be there proceeded with as if the writ had been made returnable there; and any bond given shall not be affected by such mistake, but it may be proceeded on in the proper court.

SOURCES: Codes, 1880, § 1367; 1892, § 2687; 1906, § 3047; Hemingway's 1917, § 2405; 1930, § 2250; 1942, § 348.

§ 85-7-47. Replevy of property seized.

The defendant, or any person interested, may give bond, with sufficient sureties, and replevy the property seized, as provided in the action of replevin; and the rights of the parties respectively to give such bond and receive the property from the officer, and the condition of the bond, the necessary changes being made, and the duty of the officer to take it and his liability thereon, and the disposition he shall make of the property if bond be not given, and the proceeding on such bond, shall be as provided for in the like case in the action of replevin; and any bond given shall inure to the person in whose favor judgment may be given in the case, as if it were payable to him.

SOURCES: Codes, 1880, § 1368; 1892, § 2688; 1906, § 3048; Hemingway's 1917, § 2406; 1930, § 2251; 1942, § 349.

JUDICIAL DECISIONS

1. In general.

Where, upon a corporation's default in the payment of notes executed for the part payment of certain personal property, obligors executed a bond binding themselves to pay a stated sum unless the described property was before the court at a certain time to satisfy a judgment in a replevin action by the seller against the corporate purchaser, and the property had been surrendered to the sheriff, who had sold it and applied the proceeds to the personal judgment of the seller against the corporate purchaser, personal judgment should not have been entered against the obligors. Cannady v. Morris, 232 Miss. 278, 98 So. 2d 768 (1957).

Liability of sureties on replevin bond executed in laborer's lien proceedings is for return of property or its value ascertained by jury. Coleman v. Bowman, 135 Miss. 137, 99 So. 465 (1924).

§ 85-7-49. Issue and judgment.

Any person interested may contest the demand of the plaintiff on the return day of the writ, if returned, or on any day before the rendition of final judgment in the case, by filing a statement in writing, under oath, of his defense or claim, itemizing his account, if any he has; and the case shall be then at issue between the parties, and shall be tried as other cases in the court. And the judgment of the court shall be framed so as to adjust the rights of the several parties as to the subject-matter of the suit; and judgment may be given against the party liable thereto for any amount, and for the sale of any goods in the hands of the officer, and for any balance not obtained from the sale of the goods, to be made by execution as in other cases, and the costs may be adjudged as the court may consider just; and as many judgments shall be rendered as may be necessary to adjust the rights of the several parties.

SOURCES: Codes, 1880, § 1369; 1892, § 2689; 1906, § 3049; Hemingway's 1917, § 2407; 1930, § 2252; 1942, § 350.

Cross References — Trial of right of property, see §§ 11-23-7 et seq.

JUDICIAL DECISIONS

1. Pleadings.
2. Judgment.
3. Costs.

1. Pleadings.

Where the defendant contested the claim of mechanic's lien on a truck and also objected that the account was not properly itemized, but filed no pleadings questioning the account and the defendant did not follow the statute as to the methods of contesting claims, and the answer of the defendant in effect admitted the correctness of the amount, the defendant waived any objection. Hannan Motor Co. v. Darr, 212 Miss. 870, 56 So. 2d 64 (1952).

Where defendant's answer alleged agreement of plaintiffs to settlement it was unnecessary for him to file an itemized statement of payments made. Easterling v. Shaifer, 38 So. 230 (Miss. 1905).

Where defendant pleaded payment he was entitled to introduce itemized account of payments made without filing it. Easterling v. Shaifer, 38 So. 230 (Miss. 1905).

2. Judgment.

Where purchaser of a car under a retained title contract incurred a bill for repairs which was necessary for preservation and the operation of the automobile and to prevent its deterioration, the mechanic was entitled to enforce a mechanic's lien which was superior to the rights of the seller who repossessed the car upon a default on the contract. Commercial Sec. Co. v. Kriner, 53 So. 2d 92 (Miss. 1951).

Variance as to date of contract did not justify peremptory instruction. Hill v. Judd, 96 So. 849 (Miss. 1923).

In enforcement of laborer's lien against seed, giving judgment against replevin bond without proof of value of seed is error. McCoy v. Tolar, 128 Miss. 202, 90 So. 628 (1922).

Peremptory instruction for plaintiff was erroneous where defendant pleaded payment by sworn written statement as defense to suit to fix mechanic's lien. Easterling v. Shaifer, 38 So. 230 (Miss. 1905).

The proceeding to enforce the lien is both in rem and in personam, general judgment being rendered against the person liable and the property seized condemned to be sold for its satisfaction. May v. Williams, 61 Miss. 125, 48 Am. R. 80 (1883).

3. Costs.

Costs should be awarded against the person who, in view of all the circumstances, ought equitably to bear it. May v. Williams, 61 Miss. 125, 48 Am. R. 80 (1883).

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Liens § 93.

53 Am. Jur. 2d, Mechanics' Liens §§ 409 et seq.

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Forms 171 et seq. (judgments or decrees).

§ 85-7-51. Death of party not to abate suit.

If any party to the suit die, it shall not abate, but may be proceeded with as in other personal actions in such case; and if any party thereto die after judgment, the same may be executed and enforced as judgments in other personal actions in such case.

SOURCES: Codes, 1880, § 1370; 1892, § 2691; 1906, § 3051; Hemingway's 1917, § 2409; 1930, § 2253; 1942, § 351.

§ 85-7-53. Sale of steamboat or water craft and its effect.

If the special writ of execution be for the sale of a steamboat or other water craft, the officer shall levy on, advertise and sell the same as personal property too cumbersome to be moved is levied on and sold for debt; and the purchaser shall acquire the same free from all prior encumbrances saving the rights of those having concurrent liens under this chapter.

SOURCES: Codes, 1892, § 2711; 1906, § 3071; Hemingway's 1917, § 2431; 1930, § 2254; 1942, § 352.

Cross References — Lien on watercraft, see § 85-7-7.
Salvage of abandoned boats, see §§ 89-17-1 et seq.

SALE OF TIMEPIECE, JEWELRY, ETC. FOR REPAIR CHARGES

Sec.	
85-7-71.	Definition.
85-7-73.	Sale of watches, jewelry, etc., left over 90 days for repairs, etc. permitted.
85-7-75.	Notice to owners.
85-7-77.	Sale; disposition of proceeds.
85-7-79.	Notices required to be posted.
85-7-81.	Purpose and intent of Sections 85-7-71 through 85-7-81.

§ 85-7-71. Definition.

As used in Sections 85-7-71 through 85-7-81, the term "person" shall mean a natural person, partnership, corporation, or other legal entity.

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

§ 85-7-73. Sale of watches, jewelry, etc., left over 90 days for repairs, etc. permitted.

Any watch, clock, timepiece, ring, jewelry, or other item, which has been repaired, altered, cleaned, sized, rebuilt, adjusted, or regulated, remaining in the possession of a person for a period of ninety (90) days or more, may be sold to pay reasonable or agreed charges, together with any costs or expenses provided for in Sections 85-7-71 through 85-7-81. Provided, however, that the person to whom such charges are payable and owing shall first notify the owner or owners of the proposed sale of the articles belonging to them and the amount of the charges due thereon.

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. Legal Forms 2d, Liens § 165:24 (notice of lien and of sale-jeweler's lien for repairs).

§ 85-7-75. Notice to owners.

The mailing by registered or certified United States mail of a letter, with a return address marked thereon, addressed to the owner or owners at their address given at the time of delivery of such articles to the person, shall constitute notice under the provisions of Sections 85-7-71 through 85-7-81. Said notice shall be mailed at least thirty (30) days before the articles belonging to such owner or owners may be sold for charges due thereon. The cost of mailing said letter shall be added to the charges.

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

§ 85-7-77. Sale; disposition of proceeds.

If the chattel or chattels are not redeemed within thirty (30) days after the mailing of such letter, the person may sell such articles on the day and at the time and place specified in such letter. Such sales may be made either at public auction or by private sale. The proceeds of the sale in excess of the charges and necessary expenses of the procedure required by Sections 85-7-71 through 85-7-81 shall be held by the person for a period of six (6) months and if not reclaimed by the owner thereof within that time shall escheat to the county and be paid over to the chancery clerk to be placed into the general fund of the county in which the sale was held.

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

§ 85-7-79. Notices required to be posted.

All persons taking advantage of Sections 85-7-71 through 85-7-81 must keep posted at all times in a prominent place in their receiving office or offices two (2) notices which read as follows: “All watches, clocks, timepieces, rings, jewelry, or other items, which have been repaired, altered, cleaned, sized, rebuilt, adjusted, or regulated, and not called for in ninety (90) days, will be sold to pay charges.”

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. Legal Forms 2d, Liens § 165:24 (notice of lien and of sale-jeweler's lien for repairs).

§ 85-7-81. Purpose and intent of Sections 85-7-71 through 85-7-81.

The purpose and intent of Sections 85-7-71 through 85-7-81 is to provide an inexpensive means of enforcing liens for small amounts, and to that end the provisions of said sections shall be construed to create a lien in addition to, and shall not exclude, any liens which may exist by virtue of either the common law or any other statute of the State of Mississippi.

SOURCES: Codes, 1942, § 352.5; Laws, 1964, ch. 377, eff from and after passage (approved April 23, 1964).

MECHANICS AND STABLEKEEPERS

SEC.	
85-7-101.	Articles constructed, manufactured or repaired; lien for labor and materials.
85-7-103.	Stable keepers; lien on animals.
85-7-105.	Remedy where lienholder loses possession to owner.
85-7-107.	Lien on motor vehicle for labor and materials used in constructing, manufacturing or repairing vehicle; notice to legal owner and holder of any lien; judgment on lien; redemption; sale of vehicle.

§ 85-7-101. Articles constructed, manufactured or repaired; lien for labor and materials.

Except as otherwise provided in Section 85-7-107, all carriages, buggies, wagons, plows, or any article constructed, manufactured or repaired for any person, and at his instance, shall be liable for the price of the labor and material employed in constructing, manufacturing or repairing the same; and the mechanic to whom the price of said labor and material may be due shall have the right to retain possession of such things so constructed, manufactured or repaired until the price be paid; and if the same shall not be paid within thirty (30) days, he may commence his suit in any court of competent jurisdiction and upon proof of the value of the labor and materials employed in such repairs, manufacture or construction, he shall be entitled to judgment against the party for whom such labor was done or materials furnished, with costs, as in other cases, and to a special order for the sale of the property retained in his possession for the payment thereof, with costs, and to an execution, as in other cases, for the residue of what remains unpaid after sale of the property.

SOURCES: Codes, 1880, § 1383; 1892, § 2715; 1906, § 3075; Hemingway's 1917, § 2435; 1930, § 2255; 1942, § 353; Laws, 1988, ch. 542, § 2, eff from and after July 1, 1988.

Cross References — Arbitration of controversies arising out of construction contracts and related agreements, and failure of arbitration to effect liens, see § 11-15-101.

JUDICIAL DECISIONS

1. In general.
2. Construction, manufacture, or repair, what constitutes.
3. Persons entitled to lien.
4. Surrender of possession.
5. Priority of liens.
6. Liability.
7. Actions to enforce liens.
8. Judgment.

1. In general.

The lien of one making necessary repairs to an automobile is not lost by a void sale to foreclose the lien at which he became the purchaser. Mississippi Motor Fin., Inc. v. Thomas, 246 Miss. 14, 149 So. 2d 20 (1963).

The right of a plaintiff to obtain a personal judgment where he asserts a mechanic's lien against the truck was one which the plaintiff could exercise in his own discretion. Hannan Motor Co. v. Darr, 212 Miss. 870, 56 So. 2d 64 (1952).

Whether a new battery, battery cable, additional oil pumps and several sets of "points" were reasonably necessary for the preservation and operation of an automobile and to prevent its deterioration would depend upon proof as to the conditions of those of the same kind and character that had been recently purchased for the same purpose at the time the last ones were installed. Eastex Fin. Co. v. Bryant, 207 Miss. 414, 42 So. 2d 418 (1949).

This section [Code 1942, § 353] does not merely give the mechanic the right to acquire a lien on machinery and equipment, but creates such lien. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939); Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

Statute declares right and lien had at common law and provides a method for enforcement thereof. J.A. Broom & Son v. S.S. Dale & Sons, 109 Miss. 52, 67 So. 659 (1915).

2. Construction, manufacture, or repair, what constitutes.

Work of disassembling, hauling, and reassembling an oil well drilling rig does not constitute construction, manufacture, or repair within the meaning of this section [Code 1942, § 353], and such activities are insufficient to afford the person performing them a lien for the value of his services. White v. Cabot Corp., 194 So. 2d 499 (Miss. 1967).

"Construct" as used in this section [Code 1942, § 353] providing that any article constructed shall be liable for price of labor and material employed in the constructing means to put together the constituent parts of something in their proper place and order, and lien given under this section may be enforced in same manner as in cases of lien for purchase money of goods. Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

3. Persons entitled to lien.

Conditional vendor of oil well drilling rig is entitled to repossess the same from one who retained it and asserted a lien thereon for the cost of disassembling, transporting, and reassembling it, but who had done no work in connection with the rig which constituted construction, manufacture, or repair, as those words are used in this section [Code 1942, § 353]. White v. Cabot Corp., 194 So. 2d 499 (Miss. 1967).

Where both the lessor and lessee requested the mechanic to perform necessary repairs upon the plane, it being agreed that the lessor was to pay for the major repairs and the lessee to pay for the minor repairs, in the absence of any agreement by the mechanic waiving his statutory lien for repairs upon the plane, or by which he contracted to waive his right to enforce a mechanic's lien thereon, the mechanic had a lien upon the airplane for minor repairs made, although such were chargeable to the lessee. Taylor v. Elliott, 229 Miss. 530, 91 So. 2d 711 (1956).

Service station operator is not entitled to lien under this section [Code 1942, § 353] on an automobile for accessories which were sold in regular course of business and where no labor was both performed and charged for in the installation of such accessories in the repairing of the automobile. Eastex Fin. Co. v. Bryant, 207 Miss. 414, 42 So. 2d 418 (1949).

Operator of service station not entitled to lien under this section [Code 1942, § 353] for gas, oil, grease, brake fluid and wash jobs supplied for automobile. Eastex Fin. Co. v. Bryant, 207 Miss. 414, 42 So. 2d 418 (1949).

A garageman who repaired a truck at the request of the lessee who was under contractual obligation to keep it in repair was entitled to retain possession of the truck until payment of the repair bill as against one who had purchased the truck from the original lessor. Martin v. Broadhead, 202 Miss. 281, 32 So. 2d 433 (1947).

Where dealer took in automobile on trade with knowledge of outstanding conditional sales contract requiring buyer to keep automobile repaired, and made repairs and later sold automobile and assigned asserted mechanic's lien for repairs to buyer, neither dealer nor buyer, assignee, could claim lien as against conditional vendor, and vendor could recover in replevin. Federal Credit Co. v. Holloman, 165 Miss. 211, 147 So. 485 (1933).

Dealer taking over automobile with knowledge of outstanding conditional sales contract, requiring buyer to keep it in repair, acquired no lien against itself for repairs made by it. Federal Credit Co. v. Holloman, 165 Miss. 211, 147 So. 485 (1933).

One selling tires in usual course of trade and placing them on automobile held not entitled to mechanic's lien on automobile. Hardy v. Watkins, 150 Miss. 861, 117 So. 255 (1928).

Mechanic has no lien on jitney bus for charges for "going after and bringing in the car" in order to repair it. Orr v. Jackson Jitney Car Co., 115 Miss. 140, 75 So. 945 (1917).

4. Surrender of possession.

The holder of a mechanic's lien created by this section [Code 1942, § 353] may not resort to replevin to recover possession of property repaired after having parted with possession. Central Motor Exch., Inc. v. Thompson, 236 So. 2d 736 (Miss. 1970).

Where machinery and equipment had been in the possession or under the control of one claiming a mechanic's lien while being prepared, and he surrendered possession thereof to the owner, the lien was retained to the extent that is allowed in cases of liens for purchase money of goods, and was enforceable while the property remained in the hands of the owner, or in the hands of one deriving title or possession through the owner, with notice that the indebtedness represented by the mechanic's lien was unpaid. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

5. Priority of liens.

Under Code 1972, § 75-9-310, a repairman's lien acquired under Code 1972, § 85-7-101 for services in repairing plaintiff's tractor while under lease to a third party, would take priority over plaintiff's prior perfected security interest governing the lease, notwithstanding the fact that the third party defaulted on the lease agreement with plaintiff subsequent to the repairman's return of the tractor to the third party, where the third party voluntarily restored possession of the tractor to defendant who thus had a possessory lien; the provisions of Code 1972, §§ 75-9-310 and 85-7-101 manifest an intention that such statutes are to be read and interpreted in pari materia. Thorp Com. Corp. v. Mississippi Rd. Supply Co., 348 So. 2d 1016 (Miss. 1977).

A mechanic's lien for necessary repairs to an automobile is superior to the lien of a conditional vendor. Mississippi Motor Fin., Inc. v. Thomas, 246 Miss. 14, 149 So. 2d 20 (1963).

Where purchaser of a car under a retained title contract incurred a bill for repairs which was necessary for preservation and the operation of the automobile and to prevent its deterioration, the mechanic was entitled to enforce a mechanic's lien which was superior to the rights of the seller who repossessed the car upon a default on the contract. Commercial Sec. Co. v. Kriner, 53 So. 2d 92 (Miss. 1951).

One who claims his mechanic's lien on motor truck for its repair is superior to lien retained for unpaid purchase price has burden of establishing that labor and materials furnished constitute repairs, as distinguished from articles purchased for truck or fuel to enable it to operate, and that such repairs were reasonably necessary to preserve truck and permit its ordinary operation and prevent deterioration. Funchess v. Pennington, 205 Miss. 500, 39 So. 2d 1 (1949).

Mechanic's and materialman's lien for labor performed and materials furnished in connection with installations of fixed machinery and equipment to prepare manufacturing plant for operation has priority over lien of deed of trust executed after mechanic acquired his lien in compliance with prior agreement to secure note by deed of trust on after acquired property in nature of machinery and equipment to be acquired and used in manufacturing business. Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

Where one, who had made repairs to a truck, intervened in an action by subsequent repairmen against the conditional vendee of the truck to recover for their labor and to impress a lien upon the truck, and, the truck having been condemned to be sold to pay for all the repairs, took an assignment of the subsequent repairmen's lien and their interest in the judgment and then purchased the truck at the sale thereunder, thereby acquiring the vendee's title, which was the ownership of the truck subject to the lien of the conditional sales contract, the mechanic's liens were not merged into the judgment, but remained in effect as against the vendor's assignee, and the asignee was entitled to dispossess the holder of the mechanic's liens only when it had paid him what the purchaser of the truck owed him, if anything, for the repairs to it. GMAC v. Shoemake, 192 Miss. 446, 6 So. 2d 309 (1942).

With respect to the priority as between a mechanic's lien claimant and the holder of a deed of trust, the presumption would be that the owner of the property informed the beneficiary in the deed of trust of the existence of such mechanic's lien, since it would have been unlawful for the owner to have obtained the loan and to have given a lien in favor of the beneficiary in such deed of trust without advising her of the existence of any lien then outstanding against the property. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

As to a claimed mechanic's lien for indebtedness incurred prior to the execution of a deed of trust, the burden of proof was upon the beneficiary of the deed of trust to show that she acquired her lien without notice of the mechanic's lien created by this section [Code 1942, § 353]; and to support the affirmative defense of lack of knowledge, it was not sufficient merely to show that the attorney of such beneficiary, who negotiated the loan, made a diligent inquiry and investigation and failed to acquire any notice or knowledge of the existence of the mechanic's lien. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

As to items of labor done and material furnished subsequent to the execution of a deed of trust on the property in question, the mechanic's lien would be paramount to the lien of the deed of trust where it was shown that the labor done and materials furnished were necessary to permit the operation and to prevent the deterioration of the property. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

Lien on motortruck for repairs necessary for operation thereof and to prevent its deterioration, made at request of assignee of buyer of truck on conditional sales contract under which seller retained title, held superior to seller's lien notwithstanding mechanic's knowledge of seller's lien, since repairs were impliedly authorized by seller. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

Repair lien on automobile inferior to rights of a seller with title retained, unless repair shown reasonably necessary to preserve property and permit its operation. Moorhead Motor Co. v. H.D. Walker Auto Co., 133 Miss. 63, 97 So. 486 (1923).

6. Liability.

Fact that conditional seller of motortruck, who had retained title, impliedly authorized repair so as to render truck subject to repairman's lien, did not create relation of debtor and creditor between repairman and conditional seller so as to render seller personally liable for repairs. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

Conditional seller of motortruck who retained title is not liable in case of a deficiency for repairs on truck made at instance of conditional buyer or his assignee, since liability of seller extends no further than the property. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

7. Actions to enforce liens.

The holder of a statutory mechanic's lien who has parted with possession of that property can only enforce his lien in the manner and form that a purchase money lien may be enforced and cannot resort to replevin. Central Motor Exch., Inc. v. Thompson, 236 So. 2d 736 (Miss. 1970).

Assignee of note and deed of trust covering machinery and equipment in manufacturing plant who files suit in chancery court for foreclosure of deed of trust, for appointment of receiver, for adjudication of priorities of liens and moves to abate prior action filed by mechanic to enforce his lien, must abide by equities of case resulting from fact that mechanic's lien had been created in favor of mechanic without notice of existence of prior executed note containing agreement to subsequently give deed of trust on same property to which mechanic's lien attached. Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

In proceeding to enforce repairman's lien on motortruck wherein conditional seller of truck appeared claiming the truck, interest of both mechanic and seller of truck should be ascertained. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

Suit to enforce lien on automobile is an action in rem. West Point Motor Car Co. v. McGhee, 122 Miss. 604, 84 So. 690 (1920).

Materialman could not recover against owner of building for materials furnished contractor in the erection thereof where petition did not aver that owner was obligated to pay for such material and did not charge that at the time notice was given the owner was indebted to the contractor. Smith v. Frank Gardener Hdwe. & Supply Co., 83 Miss. 654, 36 So. 9 (1904).

8. Judgment.

Plaintiff securing mechanic's lien in justice court and judgment for debt may, on appeal, take judgment on appeal bond without establishing lien. Dudley v. Waltman, 156 Miss. 483, 126 So. 1 (1930).

RESEARCH REFERENCES

ALR. Priority as between lien for repairs and the like, and right of seller under conditional sales contract. 36 A.L.R.2d 198.

Priority as between artisans' lien and chattel mortgage. 36 A.L.R.2d 229.

Municipal property as subject to mechanic's lien. 51 A.L.R.3d 657.

Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanics' lien, or as extending time for filing such a lien. 51 A.L.R.3d 1087.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold. 59 A.L.R.3d 278.

Garagemen's lien: modern view as to validity of statute permitting sale of vehicle without hearing. 64 A.L.R.3d 814.

Enforceability of single mechanic's lien upon several parcels against less than the entire property liened. 68 A.L.R.3d 1300.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Removal or demolition of building or other structure as basis for mechanics' lien. 74 A.L.R.3d 386.

Vacation and sick pay and other fringe benefits as within mechanic's lien statute. 20 A.L.R.4th 1268.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 1, 2, 22 et seq.

12A Am. Jur. Legal Forms 2d, Mechanics Liens §§ 173:1 et seq.

§ 85-7-103. Stable keepers; lien on animals.

The owner of every livery stable, sale stable, feed stable or public pasture shall have a lien on every horse, mule, cow, or other animal for the price of feeding, grooming, training, grazing, or keeping the same, at the instance of the owner of the animal, and shall have the right to retain possession of the animal until such price be paid. If the price be not paid in ten (10) days after it is due, the person to whom it is owing may commence suit therefor before a justice of the peace where the principal of the amount does not exceed Two Hundred Dollars ($200.00), and in the circuit court where it exceeds that sum, setting forth the amount of the debt, how it accrued, and a description of the animal; and, upon proof of the debt that it is due for feeding, grooming, training, grazing or keeping the animal, he shall be entitled to judgment against the owner for the amount due and sued for and the price of feeding, grooming, training, grazing and keeping the animal since the institution of the suit if the whole amount do not exceed the jurisdiction of the court, with costs as in other cases, and to a special order and execution for the sale of the property upon which the lien exists for the payment of such judgment and costs, and to an execution, as in other cases, for the residue of what remains unpaid after sale of the property. The lien created by this section shall be subordinate to any prior encumbrance on such animal of which the owner of the stable had notice, actual or constructive, unless the animal were fed, groomed, trained, grazed or kept by the consent of the encumbrancer.

SOURCES: Codes, 1892, § 2722; 1906, § 3082; Hemingway's 1917, § 2442; 1930, § 2256; 1942, § 354; Laws, 1888, p. 94; Laws, 1934, ch. 311.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 85-7-105. Remedy where lienholder loses possession to owner.

If the lienholders mentioned in Sections 85-7-101 and 85-7-103 part with possession of the property, they shall retain their liens while the property remains in the hands of the owner, or one deriving title or possession through him, with notice that the price of the labor and materials or the price of feeding, grooming, training, grazing or keeping the same was unpaid, and may enforce the same in like manner as is provided in Sections 85-7-31 and 85-7-53.

SOURCES: Codes, 1880, § 1383; 1892, § 2715; 1906, § 3075; Hemingway's 1917, § 2435; 1930, § 2257; 1942, § 355; Laws, 1968, ch. 303, § 1, eff from and after passage (approved August 6, 1968).

JUDICIAL DECISIONS

1. In general.
2. Priority of liens.
3. Enforcement of liens.

1. In general.

The surrender of a truck by a garage man does not result in the garage man losing his lien thereon, except as against one deriving title or possession through the owner. Boydstun v. Cook & Co., 238 Miss. 324, 118 So. 2d 354 (1960).

Where a purchaser of a car under a retained title contract incurred a bill for repairs which was necessary for preservation and the operation of the automobile and to prevent its deterioration, the mechanic was entitled to enforce a mechanic's lien which was superior to the rights of the seller who repossessed the car upon a default on the contract. Commercial Sec. Co. v. Kriner, 53 So. 2d 92 (Miss. 1951).

A garageman surrendering possession of a repaired truck to its owner without collecting his repair charges did not lose his lien as against the holder of a deed of trust embracing the truck where there had been no breach of condition or foreclosure of the deed of trust. Watson v. Broadhead, 203 Miss. 142, 33 So. 2d 302 (1948).

Where machinery and equipment had been in the possession or under the control of one claiming a mechanic's lien while being repaired, and he surrendered possession thereof to the owner, the lien was retained to the extent that is allowed in cases of liens for purchase money of goods, and was enforceable while the property remained in the hands of the owner, or in the hands of one deriving title or possession through the owner, with notice that the indebtedness represented by the mechanic's lien was unpaid. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

2. Priority of liens.

Lien on motortruck for repairs necessary for operation thereof and to prevent its deterioration, made at request of assignee of buyer of truck on conditional sales contract under which seller retained title, was superior to seller's lien notwithstanding surrender of possession and mechanic's knowledge of seller's lien, since repairs under such circumstances were impliedly authorized by seller. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

3. Enforcement of liens.

The holder of a statutory mechanic's lien who has parted with possession of that property can only enforce his lien in the manner and form that a purchase money lien may be enforced and cannot resort to replevin. Central Motor Exch., Inc. v. Thompson, 236 So. 2d 736 (Miss. 1970).

In proceeding to enforce repairman's lien on motortruck wherein conditional seller of truck appeared claiming the truck, interest of both mechanic and seller of truck should be ascertained. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

Fact that conditional seller of motortruck, who had retained title, impliedly authorized repair so as to render truck subject to repairman's lien, did not create relation of debtor and creditor between repairman and conditional seller so as to render seller personally liable for repairs. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

Conditional seller of motortruck who retained title is not liable in case of a deficiency for repairs on truck made at instance of conditional buyer or his assignee, since liability of seller extends no further than the property. De Van Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

RESEARCH REFERENCES

ALR. Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Removal or demolition of building or other structure as basis for mechanics' lien. 74 A.L.R.3d 386.

Mortgagee-lender's duty, in disbursing funds, to protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property. 30 A.L.R.4th 134.

§ 85-7-107. Lien on motor vehicle for labor and materials used in constructing, manufacturing or repairing vehicle; notice to legal owner and holder of any lien; judgment on lien; redemption; sale of vehicle.

All motor vehicles repaired for any person, and at his instance, shall be liable for the price of the labor and material employed in constructing, manufacturing or repairing the same; and the mechanic to whom the price of said labor and material may be due shall have the right to retain possession of such motor vehicles so repaired until the price be paid. If such price shall not be paid within thirty (30) days, and the person to whom such charges are payable and owing intends to commence suit as provided in this section, such person shall notify, by certified mail, the legal owner and the holder of any lien of the amount of charges due thereon and provide an opportunity for redemption. If such property has not been redeemed within five (5) days after the mailing of such certified letter, the person to whom such charges are payable and owing may commence suit in any court of competent jurisdiction, and upon proof of the value of the labor and materials employed in such repairs, manufacture or construction, and that such labor and materials furnished were reasonably necessary to prevent deterioration, permit operation and preserve the property, shall be entitled to judgment against the party for whom such labor was done or materials furnished, with costs, as in other cases, and to a special order for the sale of the property retained in his possession for the payment thereof, with costs, and to an execution, as in other cases, for the residue of what remains unpaid after sale of the property. The proceeds of the sale of such property in excess of the amount needed to pay the judgment and necessary expenses of the procedure required by this section shall be held by the person for a period of six (6) months, and if not reclaimed by the owner thereof within that time shall become the property of the county and be paid over to the chancery clerk of the county in which the sale was held to be deposited into the county general fund, subject however to any rights of recorded lienholders.

SOURCES: Laws, 1988, ch. 542, § 1; Laws, 2005, ch. 331, § 1, eff from and after July 1, 2005.

Cross References — Mississippi Motor Vehicle Title Law, see § 63-21-1, et seq.

Lien on all carriages, buggies, wagons, plows, or any article constructed, manufactured or repaired for labor and materials, see § 85-7-101.

JUDICIAL DECISIONS

1. Reserved for future use.
2. Construction with other law.
3. Defenses.

1. Reserved for future use.

2. Construction with other law.

The mechanic's lien statute limits recovery to the costs of labor and materials, unlike Miss. Code Ann. § 85-7-251, which governs liens available for towing and storing motor vehicles. Allstate Ins. Co. v. Green, 794 So. 2d 170 (Miss. 2001).

3. Defenses.

Where a defendant seeking to set aside a default judgment had a colorable defense to a claim asserted under the mechanic's lien statute, since the car at issue had never been titled in Mississippi, the trial court erred in not setting aside the default judgment. Allstate Ins. Co. v. Green, 794 So. 2d 170 (Miss. 2001).

RESEARCH REFERENCES

ALR. Loss of garageman's lien on repaired vehicle by owner's use of vehicle. 74 A.L.R.4th 90.

Am Jur. 12A Am. Jur. Legal Forms 2d, Mechanics Liens §§ 173:1 et seq.

OWNER'S LIEN FOR RENT ON PERSONAL PROPERTY IN SELF-STORAGE FACILITY

Sec.
85-7-121. Definitions.
85-7-123. Owner's lien for rent on personal property in self-storage facility.
85-7-125. Enforcement of owner's lien.
85-7-127. Satisfaction of lien; sale of property.
85-7-129. Application of Sections 85-7-121 through 85-7-129 to rental agreements entered into on or after July 1, 1988.

§ 85-7-121. Definitions.

As used in Sections 85-7-121 through 85-7-129, the following terms shall have the meaning ascribed to them herein, unless the context clearly requires otherwise:

(a) "Default" means the failure timely to perform any obligation or duty set forth in Sections 85-7-121 through 85-7-129 and the rental agreement;

(b) "Last known address" means that address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address;

(c) "Leased space" means the individual storage space at the self-storage facility which is leased or rented to an occupant pursuant to a rental agreement.

(d) "Occupant" means a person, his sublessee, successor or assign entitled to the use of a leased space at a self-storage facility under a rental agreement to the exclusion of others;

(e) "Owner" means the owner, operator, lessor or sublessor of a self-storage facility, an agent or any person authorized to manage the facility or to receive rent from an occupant under a rental agreement. The term "owner" shall not be construed to mean a warehouseman unless the owner issues a warehouse receipt, bill of lading or other document of title for the personal property stored;

(f) "Personal property" means movable property not affixed to land and includes, but is not limited to, goods, wares, merchandise, watercraft, motor vehicles and household items;

(g) "Rental agreement" means any written agreement or lease that establishes or modifies the terms, conditions, rules or any other provisions concerning the use and occupancy of a self-storage facility;

(h) "Self-storage facility" means any real property used for the purpose of renting or leasing individual storage space to occupants who are to have access to such space for the purpose of occupants themselves storing and removing personal property on "self-service basis"; provided, however, that an occupant may not use a leased space for residential purposes.

SOURCES: Laws, 1988, ch. 595, § 1, eff from and after July 1, 1988.

§ 85-7-123. Owner's lien for rent on personal property in self-storage facility.

The owner has a lien upon all personal property located at a self-storage facility for rent, labor or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to Sections 85-7-121 through 85-7-129. The lien provided for in this section is superior to any other lien or security interest except those which are perfected and recorded in Mississippi prior to the date of default under the rental agreement and except any tax lien as otherwise provided by law. The lien attaches as of the date the personal property is placed in the leased space and the rental agreement shall contain a statement in bold type notifying the occupant of the existence of the lien and that the property stored in the leased space may be sold to satisfy the lien if the occupant is in default.

SOURCES: Laws, 1988, ch. 595, § 2, eff from and after July 1, 1988.

§ 85-7-125. Enforcement of owner's lien.

The enforcement of the owner's lien against an occupant who is in default shall be in accordance with the following:

(a) No enforcement action shall be taken by the owner, other than denial of access, as provided for in the rental agreement until the occupant has been in default continuously for a period of fourteen (14) days.

(b) During the default period the occupant shall be notified in writing. The notice shall be delivered in person or sent by United States certified mail, return receipt requested, to the last known address of the occupant. Notices shall be deemed delivered when deposited in the United States mail with postage paid. The notice shall include an itemized statement of the owner's claim showing the sum due at the time of the notice, the date when the sum became due and any other sums that shall accrue. The notice shall also include a demand for payment of the sum due within a specified time not less than fourteen (14) days after the date of the notice, a statement that the contents of the occupant's lease space are subject to the owner's lien, the name, street address and telephone number of the owner, or his designated agent, whom the occupant may contact to respond to the notice, a conspicuous statement that unless the claim is paid within the time stated, the personal property will be advertised for public or private sale or will be otherwise disposed of at a specified time and place.

(c) After the expiration of the time given in the owner's notice, the owner shall publish, in legal notices, advertisement of the sale to the highest bidder in a newspaper of general circulation where the self-storage facility is located. The notice shall include the address of the self-storage facility where the personal property is located, and the name of the occupant, and the time, place and manner of the sale.

(d) A sale to the highest bidder shall take place not sooner than fifteen (15) days after the publication. If there is no newspaper of general circulation in the county in which the self-storage facility is located, the advertisement shall be posted at least ten (10) days before the date of the sale and in not less than six (6) conspicuous places in the neighborhood where the self-storage facility is located.

(e) If no one purchases the property at the sale and if the owner has complied with the foregoing procedures, the owner may otherwise dispose of the property. Any sale or disposition of the personal property shall be held at the self-storage facility or at the nearest suitable place to the place the personal property is held or stored.

SOURCES: Laws, 1988, ch. 595, § 3, eff from and after July 1, 1988.

§ 85-7-127. Satisfaction of lien; sale of property.

(1) Before any sale or other disposition of personal property pursuant to Sections 85-7-121 through 85-7-129, the occupant may pay the amount necessary to satisfy the owner's lien and the reasonable expenses incurred under Sections 85-7-121 through 85-7-129, and thereby redeem the personal property. Upon the payment and satisfaction of the amount necessary to satisfy the lien, the owner shall return the personal property and thereafter the owner shall have no liability to any person with respect to such personal property. Unless the rental agreement specifically provides otherwise and until a lien sale under Sections 85-7-121 through 85-7-129, the exclusive care, custody and control of all personal property stored in the leased self-storage space remains vested in the occupant.

(2) The owner may buy at any sale of personal property to enforce the owner's lien.

(3) A purchaser in good faith of the personal property sold to satisfy the owner's lien takes the property free of any rights of persons against whom the

lien was valid, despite noncompliance by the owner with the requirements of this section.

(4) In the event of a sale under Sections 85-7-121 through 85-7-129, the owner may satisfy his lien from the proceeds of the sale but shall hold the balance, if any, for delivery on demand to the occupant. In no event shall the owner's liability exceed the proceeds of the sale. If the occupant does not claim the balance of the proceeds within one (1) year of the date of the sale, such balance shall be deemed to be abandoned and the owner shall pay such balance to the Treasurer of the State of Mississippi, who shall deposit such funds into the General Fund.

SOURCES: Laws, 1988, ch. 595, § 4, eff from and after July 1, 1988.

§ 85-7-129. Application of Sections 85-7-121 through 85-7-129 to rental agreements entered into on or after July 1, 1988.

The provisions of Sections 85-7-121 through 85-7-129 shall apply only to rental agreements entered into on or after July 1, 1988. Rental agreements entered into prior to July 1, 1988, shall remain valid.

SOURCES: Laws, 1988, ch. 595, § 5, eff from and after July 1, 1988.

LABORERS, MATERIALMEN, ARCHITECTS, SURVEYORS, ENGINEERS, WATER WELL DRILLERS AND CONTRACTORS

SEC.

85-7-131. Property subject to lien; effect as to purchasers, etc., without notice.
85-7-132. Lien to enforce violations related to oil and gas production.
85-7-133. Chancery clerk to keep record of construction liens.
85-7-135. Lien limited to contractor or employee.
85-7-137. When lien limited to building and estate of tenant.
85-7-139. Contract in writing may be recorded.
85-7-141. Commencement of suit to enforce lien.
85-7-143. Parties to the suit.
85-7-145. Summons of defendants.
85-7-147. Defenses and counterclaims.
85-7-149. Issues and trial.
85-7-151. Judgment in suits on builder's and contractor's liens; costs and attorney's fees.
85-7-153. Execution.
85-7-155. Sale of house, building, etc., with or without land; procedure; purchaser's estate in land.
85-7-157. Sale of railroad land or buildings; procedure; purchaser's estate property.

§ 85-7-131. Property subject to lien; effect as to purchasers, etc., without notice.

Every house, building, water well or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, railroad embankment, erected, constructed, altered or repaired, and every subdivision of property or subdivided property which required services, designs or construction in designing or laying out of streets or subdividing or construction of streets, sewerage, water or other utilities to be furnished by the said subdivision or by the various owners or holders or creators of said subdivision or subdivided property or individual lot or lots in connection therewith, whether inside of a municipality or outside thereof, shall be liable for the debt contracted and owing, for labor done or materials furnished or equipment rented or leased, or architectural engineers' and surveyors' or contractors' service rendered about the erection, construction, alteration or repairs thereof; and debt for such services or construction shall be a lien thereon. The architects, engineers, surveyors, laborers, rental or lease equipment suppliers and materialmen and/or contractors who rendered services and constructed the improvements shall have a lien therefor. Further, as to oil and gas wells, the operator thereof shall have such a lien upon the interest of each nonoperator owner of an interest in the mineral leasehold estate for such nonoperator's proportionate part of such labor, material and services rendered by the operator or for the operator's account in behalf of each nonoperator in the drilling, completion, recompletion, reworking or other operations of such oil and gas well. If such house, building, structure, or fixture be in a city, town or village, the lien shall extend to and cover the entire lot of land on which it stands and the entire curtilage thereto belonging; or, if not in a city, town or village, the lien shall extend to and cover one (1) acre of land on which the same may stand, if there be so much, to be selected by the holder of the lien. If the structure be a water well, the lien shall extend only to all pumps, pipes, equipment therein and all water well appurtenances. If the structure be an oil or gas well, the lien shall extend to the nonoperator's interest in the mineral estate and the fixtures and equipment in the producing unit assigned such well by the State Oil and Gas Board. If the structure be a railroad or railroad embankment, the lien shall extend to and cover the entire roadbed and right-of-way, depots and other buildings used or connected therewith. If the services of the architect, surveyor, engineer, laborers, materialmen, rental or lease equipment suppliers or of the contractors shall be upon the whole subdivision, the lien shall extend to and cover the entire subdivision; but if a part only of the land is subdivided and laborers', materialmen's, rental or lease equipment suppliers', architects', surveyors' or engineers' services are required and contractors are employed, then the lien shall extend to only that portion of said property upon which the services were required or upon which or in connection with which the work was done or the materials or rental or lease equipment were furnished. Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court, as hereinafter stated; delivery of material to the job is prima facie evidence of its use therein, and use of water from a water well is prima facie evidence of acceptability of the well. In the case of oil and gas wells, such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of filing notice of such lien as provided by Section 85-7-133.

SOURCES: Codes, Hutchinson's 1848, ch. 45, art. 6 (1); 1857, ch. 39, art. 1; 1871, § 1603; 1880, § 1378; 1892, § 2698; 1906, § 3058; Hemingway's 1917, § 2418; 1930, § 2258; 1942, § 356; Laws, 1926, ch. 150; Laws, 1928, ch. 137; Laws, 1962, ch. 488, §§ 1, 2; Laws, 1964, ch. 291; Laws, 1979, ch. 379; Laws, 2010, ch. 372, § 1, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment, in the first sentence, inserted "or equipment rented or leased"; in the second and eighth sentences, inserted "rental or lease equipment suppliers"; and in the eighth sentence, inserted "rental or lease equipment supplier's" and "or rental or lease equipment."

Cross References — Arbitration of controversies arising out of construction contracts and related agreements, and failure of arbitration to effect liens, see § 11-15-101.

Subcontractors and laborers binding amount due contractor by written notice, see § 85-7-181.

Creation of lien, see § 85-7-261.

Liens on the same building being concurrent, see § 85-7-263.

JUDICIAL DECISIONS

I. Generally.

1. In general.
2. Contract—necessity and sufficiency of.
3. —Contract, assignment of.
4. Attachment of lien.
5. Property subject to lien.
6. Persons entitled to lien.
7. Notice.
8. Enforcement of lien.
9. Judgment.
10. Assignment of lien.
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II. Priority of Liens.

12. Generally.
13. Federal tax liens.
14. Mortgages.
15. Liens encompassing equipment or machinery.
16. Waiver or estoppel.
17. Pleadings; burden of proof.

I. Generally.

1. In general.

Lien arising automatically under Mississippi construction statute was statutory lien, not judicial lien subject to avoidance as impairing Chapter 7 debtors' homestead exemption, though creditor could not enforce lien without filing action, and creditor filed enforcement action and obtained judgment prepetition; judgment did not transform statutory lien into judgment lien. In re Wiltcher, 204 B.R. 488 (Bankr. S.D. Miss. 1996).

Construction lender has no duty of reasonable diligence in disbursing to owner proceeds of construction loan, such that materialmen might recover from lender for losses caused thereby; materialmen hold lien against property only to extent that they have brought themselves within terms of statute; and, automatic stay incident to filing of petition in bankruptcy does not prohibit materialman from filing notice of its lien under statute. Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506 (Miss. 1987).

Construction lien perfected under § 85-7-131 by filing of notice with chancery clerk remains valid through federal bankruptcy proceedings. In re Simmons, 765 F.2d 547 (5th Cir. 1985).

A suit to establish a materialman's lien may be combined with a suit for a personal judgment as an alternative in the declaration; and in such case the declaration need not set forth the allegations in separate counts. Evans v. Central Serv. & Supply Co., 226 So. 2d 616 (Miss. 1969).

To obtain a materialman's statutory lien, statutory prerequisites must be strictly complied with. Jones Supply Co. v. Ishee, 249 Miss. 515, 163 So. 2d 470 (1964).

The legislature intended that a lien under this section [Code 1942, § 356] should not be limited to a single lot if the curtilage included more than one lot. Vinson v. Cooley, 54 So. 2d 750 (Miss. 1951).

A mechanic's lien is unknown either at law or in equity and exists only by statute and can be enforced only as the statute provides. Pincus v. Collins, 198 Miss. 283, 22 So. 2d 361 (1945).

Mechanic's lien statute does not prevent the creation of a contract lien in the nature of a mortgage to cover in the price under a mechanic's or materialman's contract. Pincus v. Collins, 198 Miss. 283, 22 So. 2d 361 (1945).

2. Contract—necessity and sufficiency of.

Workmen made a prima facie case of lien under § 85-7-131, requiring defendants to go forward with proof to overcome such showing, where the building owners authorized the lessee of the building to arrange for work to be done on the building, where the lease specifically required that such work be done, and where the lessee authorized a franchisor to act in this regard with the building owner's full awareness of such fact. Graham v. Pugh, 417 So. 2d 536 (Miss. 1982).

The testimony of materialmen that a property owner had verbally agreed to pay for materials sold by them to a contractor who abandoned construction of a home for the owner prior to its completion was insufficient, in the face of the owner's denial, to entitle them to a lien upon her property. Phillips v. F.G. & H. Millwork Mfg. Co., 190 So. 2d 843 (Miss. 1966).

Contract whereby contractor who constructed a house retained a lien thereon until he had been paid in full created a contract lien in the nature of a mortgage and not merely a mechanic's lien, since the law would put in the mechanic's lien without a contract provision to that effect. Pincus v. Collins, 198 Miss. 283, 22 So. 2d 361 (1945).

All liens are created by law or by contract, and to establish a lien the contract must be made by the owner of the property upon which a lien is sought to be impressed. Hollis & Ray v. Isbell, 124 Miss. 799, 87 So. 273, 20 A.L.R. 244 (1921).

The contract may be express or implied. Hollis & Ray v. Isbell, 124 Miss. 799, 87 So. 273, 20 A.L.R. 244 (1921).

It is not necessary to the validity of the lien that the contract be in writing. Harrison v. Breeden, 8 Miss. (7 Howard) 670 (1843).

3. —Contract, assignment of.

Builder's contract may be assigned before service of statutory notice on owner, and assignee thereof will be entitled to proceeds thereof notwithstanding that materialmen and subcontractors had furnished materials and labor which had not been paid for. Delta Lumber Co. v. Greenwood Bank & Trust Co., 123 Miss. 772, 86 So. 590 (1920).

4. Attachment of lien.

The seller of a gas heating and cooking plant under a contract providing that it should remain personal property cannot waive such provision by an action to impress a lien on the building in which the plant is placed, since he has no right to waive the provision without the consent of the owners of the realty, it being a mutually beneficial provision, and greatly to the interest of the owner that no lien exist on the realty. Mississippi Butane Gas Sys. Co. v. Glisson, 194 Miss. 457, 10 So. 2d 358 (1942).

Owner employing contractor is not liable to materialman and laborers, unless indebted to contractor when notified of claims. Citizens' Lumber Co. v. Netterville, 137 Miss. 310, 102 So. 178 (1924).

Owner taking possession of unfinished house did not thereby accept contractor's work and become liable therefor. Robinson v. De Long, 118 Miss. 280, 79 So. 95 (1918).

Wife contracting with husband for erection of a building on her separate property and paying him therefor, is liable for materials furnished and a lien may be established against her property. Banks & Co.

v. Pullen, 113 Miss. 632, 74 So. 424, 4 A.L.R. 1013 (1917).

Owner who employed mechanic to furnish material and improve house is not, nor is the house, liable to third party materialmen seeking to enforce the lien of this section [Code 1942, § 356], unless indebted to mechanic when notified, and credited with any sum paid or agreed to be paid for materials to others before such notice. Lake v. Brannin, 90 Miss. 737, 44 So. 65 (1907).

Installation of a plant for generating electric light on a steamboat gives rise to the lien. Mulholland v. Thompson-Houston Elec. Co., 66 Miss. 339, 6 So. 211 (1889).

Attaching gas fixtures to a building to be used therein gives rise to the lien. Joseph Baum & Co. v. Covert, 62 Miss. 113 (1884).

5. Property subject to lien.

Where the owner of a service station did not consent either expressly or impliedly to the erection of the awning at the service station, the seller could not enforce lien on the building or on the land. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

Where the lessor if not expressly, at least impliedly, authorized the lessee to repair the existing building and to construct a new one and therefore make a contract for that purpose with the lumber company, the lumber company acquired a lien on the building for such repair and construction and under this section [Code 1942, § 356] such lien extends to and covers the entire lot on which the buildings stand and the entire curtilage thereto belonging. Burwell v. Planters Lumber Co., 220 Miss. 79, 70 So. 2d 71 (1954).

Mechanic's lien claimant was without right to any claim against proceeds of fire insurance on building, in the absence of contract to insure for his benefit. Federal Land Bank v. Thames Lumber & Supply Co., 160 Miss. 335, 134 So. 154 (1931), overruled in part, Evans v. Central Serv. & Supply Co., 226 So. 2d 616 (Miss. 1969).

Mechanic's lien claimant who, in a petition seeking to enforce lien, did not properly select acre of rural land on which house stood, was not entitled to lien against land. Federal Land Bank v. Thames Lumber & Supply Co., 160 Miss. 335, 134 So. 154 (1931), overruled in part, Evans v. Central Serv. & Supply Co., 226 So. 2d 616 (Miss. 1969).

Lien herein cannot be enforced against agricultural high school building of county. McKinnon v. Gowan Bros., 127 Miss. 545, 90 So. 243 (1922).

No lien for labor and material furnished can attach to a state building, and, therefore, funds in hands of state agents for payment of contractor cannot be applied on claims for such labor and material unless authorized by the contract. United States Fid. & Guar. Co. v. Marathon Lumber Co., 119 Miss. 802, 81 So. 492 (1919).

Public buildings are not included in the statute. Board of Supvrs. v. Gillen, 59 Miss. 198 (1881).

6. Persons entitled to lien.

Construction liens placed by a mortgagor on his property after the property had been foreclosed were invalid under Miss. Code Ann. §§ 85-7-131 and 85-7-135 because any repairs made by the mortgagor were made without authorization or knowledge of the purchaser at foreclosure. Pepper v. Homesales, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16692 (S.D. Miss. Mar. 3, 2009).

A plaintiff who fails to establish ownership of property against which a lien is sought in the defendants is not entitled to a lien thereon. Evans v. Central Serv. & Supply Co., 226 So. 2d 616 (Miss. 1969).

A construction mortgagee who did not use reasonable diligence to see that funds advanced were used to pay materialmen and laborers, and whose advances were repaid out of a loan obtained from a mortgagee without notice of the unpaid bills, takes an assignment of the latter mortgage subject to the claims of materialmen. Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

Materialman advancing money to a contractor to meet the contractor's payroll, in addition to material furnished, in the construction of filling stations, could not, as against the owner contracting for such stations, be considered as furnishing labor, since he was not a party to the contract between the owner and the contractor, and the contractor was not, therefore, the materialman's agent in the procurement of the labor. City Coal & Lumber Co. v. Gulf Ref. Co., 184 Miss. 260, 185 So. 250 (1938).

Builder under cost plus contract under which he agreed to supervise erection of building and to furnish and pay for all labor and materials held entitled to lien for expenditures and commission. Williams & Williams v. Warren, 134 Miss. 899, 99 So. 266 (1924).

7. Notice.

Knowledge that a house is newly built and that the owner is behind in his payments to claimant is not the equivalent of actual notice of the claim of a materialman. Jones Supply Co. v. Ishee, 249 Miss. 515, 163 So. 2d 470 (1964).

A bona fide purchaser or mortgagee obtains, under this section [Code 1942, § 356], an encumbrance superior to claims of materialmen and laborers unless it has actual notice thereof, knowledge of such facts as would put it on inquiry, or constructive notice by the lienors having filed their contracts or lis pendens notices of their liens. Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

Where a construction contract between owner of premises and prime contractor did not require that the owner pay anything before the completion of the project, the owner may make payments to the prime contractor during progress of the work and he will not be held liable as to payments to subcontractors and materialmen who give statutory stop notice subsequent to making of payment. Williams v. Taylor, 216 Miss. 563, 62 So. 2d 883 (1953).

A writ of seizure of the property is an essential step in the enforcement in rem of a mechanic's lien against personal property when it is out of the possession of the person entitled to the lien; and the mere filing of a suit and of an ordinary summons to a defendant does not operate as constructive notice to subsequent purchasers under the general common-law doctrine of lis pendens. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

Notice that building was in course of construction was not sufficient notice to bank advancing money to owner secured by deed of trust of materialman's rights under unrecorded contract, it being incumbent upon materialman either to file its contract for record, or to institute proceedings to enforce its lien, or to give notice in some manner. Walker v. Macon Creamery Co., 165 Miss. 121, 146 So. 442 (1933).

Lis pendens notice of mechanic's lien must be given to affect bona fide purchasers of realty without notice. McKenzie v. Fellows, 97 Miss. 31, 52 So. 628 (1910).

8. Enforcement of lien.

A lien against the debtor's home, which arose from the furnishing of labor to construct that home, was a statutory lien which could not be avoided in bankruptcy. In re Mitchell, 276 B.R. 142 (Bankr. N.D. Miss. 2001).

A construction lien filed by paving company was enforceable against owner of property where there was sufficient evidence to establish that the general contractor was an implied agent acting within apparent authority granted by the owner when contracting with paving company. Bailey v. Worton, 752 So. 2d 470 (Miss. Ct. App. 1999).

In a laborers' and materialmen's lien on real property against the bank which held the mortgage on the property, the lienholder was entitled to judgment against the bank for the sum owed to him where the bank had foreclosed on the property after the filing of the construction lien and the initiation of the instant action and where, at the time of the foreclosure, the bank had full knowledge of the lien and the action. Self v. Nelson, 402 So. 2d 822 (Miss. 1981).

A suit to enforce a materialman's lien created by § 85-7-131 was subject to the statute of limitations provided by § 85-7-141. Further, the running of this one-year limitation period was suspended following the commencement of bankruptcy proceedings and did not commence to run again until the property at issue had been formally abandoned by order of the bankruptcy court. Home Bldg. Mart, Inc. v. Parker, 370 So. 2d 916 (Miss. 1979).

Where the original lessee had assigned its leasehold interest to another, who in turn rented to a person who incurred a debt upon which a mechanic's lien was attempted to be enforced, the original lessee was not a necessary and indispensable party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

The owner of the leasehold interest upon which a mechanic's lien is sought to be enforced is a necessary party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

Where the claimant commenced his suit in circuit court within twelve months after the money became due and payable to enforce a mechanic's and a materialman's lien and recovered a judgment establishing the lien, and then started a second suit after twelve months had expired for the purpose of having such judgment declared a prior lien to lien claimed under a deed of trust, the circuit court judgment on which relief was sought in the chancery court on the second suit, was not barred by the limitation until seven years after its rendition. Vinson v. Cooley, 54 So. 2d 750 (Miss. 1951).

When in a suit for a mechanic's and materialman's lien on heating equipment installed on hotel premises the contract was not recorded, and no notice of lis pendens was given nor writ of seizure of the property issued, and the property was claimed by the grantee of the realty from a purchaser at foreclosure of a prior deed of trust as a purchaser for value without notice of the unpaid lien, the burden was on such grantee to prove that he was a purchaser for value without notice, and in the absence of such proof, the lien claimant was entitled to recover. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

There is no requirement that a suit to enforce a materialman's lien as against personal property shall be filed within twelve months next after the time when the money becomes due as is necessary when the suit affects real property as such. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

Plaintiff may not be compelled to elect on which count he will stand in proceeding to enforce mechanic's lien, where count for personal judgment is joined with count on lien. Williams & Williams v. Warren, 134 Miss. 899, 99 So. 266 (1924).

Petition to enforce lien is not amendable 12 months after cause of action arose. Dodds v. Cavett, 133 Miss. 470, 97 So. 813 (1923).

9. Judgment.

Where the contract for the sale of a gas heating and cooking plant provided that the equipment should remain the property of the seller as security for its payment and that it should remain personal property, the seller waived whatever lien it might otherwise have had on the lot and buildings in which the equipment was installed. Mississippi Butane Gas Sys. Co. v. Glisson, 194 Miss. 457, 10 So. 2d 358 (1942).

Interest on sums due laborers and materialmen by contractor follows as a necessary incident thereto, though bond guaranteeing performance of the contract does not expressly provide therefor. United States Fid. & Guar. Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929).

If the petition for the enforcement of a materialman's lien, under this section [Code 1942, § 356], fails to state a cause of action against the owner, the judgment against him is void and its execution may be enjoined. Smith v. Frank Gardener Hdwe. & Supply Co., 83 Miss. 654, 36 So. 9 (1904).

The statutory lien of mechanics and materialmen given under this section [Code 1942, § 356] is not waived by merely taking additional security not inconsistent therewith. Parberry v. N.B. Johnson & Co., 51 Miss. 291 (1875); Smith & Vaile Co. v. Butts, 72 Miss. 269, 16 So. 242 (1894).

10. Assignment of lien.

The lien given by the statute is assignable independently of statutory authorization. Kerr v. Moore, 54 Miss. 286 (1876).

11. Waiver of lien.

Materialman's lien is not waived by taking of notes to secure amount of indebtedness. Bullock v. Hans, 208 Miss. 41, 43 So. 2d 670 (1949).

II. Priority of Liens.

12. Generally.

When a construction money lender foreclosed its deed of trust on a shopping center and purchased the property at the trustee's sale, it took title pendente lite, subject to the contingency that laborers' and materialmen's liens were valid, where the laborers and materialmen had filed their claims more than six months before the trustee's sale was advertised, and where the materialmen and laborers brought suit to enforce their liens one day before the sale and filed notice of the suit on the lis pendens record; as between the lender and the landowners, who filed suit to enforce their liens and filed a lis pendens notice two days before the trustee's sale, the lender took title subject to the outcome of the landowners' suit and could not defeat their claim by foreclosing its deed of trust. Guaranty Mtg. Co. v. Seitz, 367 So. 2d 438 (Miss. 1979).

In an action to determine the priority between a mechanic's lien and first and second deeds of trust, the mechanic's lien asserted by a contractor, who had repaired a fixture on the premises, was subordinate to the first deed of trust on the property, where the owner of that deed of trust did not consent in writing to the alteration or repair of the fixture, but had priority over the rights of purchasers of a trustee's deed which foreclosed a second deed of trust, where the purchasers of that deed bought the property at foreclosure of the second deed with notice of the lien's existence. Ziller v. Atkins Motel Co., 244 So. 2d 409 (Miss. 1971).

Under this section [Code 1942, § 356] a mechanic's lien is valid without the necessity of reduction to judgment. Geo. H. Jett Drilling Co. v. Tibbits, 230 F. Supp. 58 (W.D. La. 1964), motion denied, 234 F. Supp. 583 (W.D. La. 1964).

In suit to enforce materialmen's lien in which holders of deed of trust claimed priority on ground that at time he took deed of trust no suit had been commenced to enforce materialmen's lien, no notice of lien had been filed of record and he had no actual notice, issue of actual notice is properly submitted to jury for its determination under proper instructions from court. Bullock v. Hans, 208 Miss. 41, 43 So. 2d 670 (1949).

Bank advancing money to owner secured by deed of trust held entitled to priority over claim of materialman whose lien was not recorded, and who did not bring suit to enforce lien until after recording of deed of trust. Walker v. Macon Creamery Co., 165 Miss. 121, 146 So. 442 (1933).

Mechanic's lien for new buildings erected superior to prior encumbrance, but not to a subsequent lien without notice. Big Three Lumber Co. v. Curtis, 130 Miss. 74, 93 So. 487 (1922).

Where a mechanic repairs property on which there exists a prior lien which he knows exists, his lien for repairs will be subject to the prior lien, unless the facts show a waiver by the prior lienholder, or an implied contract to subordinate his lien to that of the mechanic. Hollis & Ray v. Isbell, 124 Miss. 799, 87 So. 273, 20 A.L.R. 244 (1921).

Where a suit, begun in due time, to enforce a lien on machinery under this section [Code 1942, § 356], is dismissed on demurrer, and plaintiff appeals and obtains a reversal, one who purchases the property under a trust deed given by the defendant takes it subject to the lien, although he buys in good faith and without notice that the appeal was taken. Smith & Vaile Co. v. Burns, 72 Miss. 966, 18 So. 483 (1895).

13. Federal tax liens.

A mechanic's lien is not entitled to priority over a lien for federal income taxes. Geo. H. Jett Drilling Co. v. Tibbits, 230 F. Supp. 58 (W.D. La. 1964), motion denied, 234 F. Supp. 583 (W.D. La. 1964).

14. Mortgages.

A lender advancing funds for a construction loan was entitled to a superior lien over mechanics' and materialmen's liens only to the extent that the lender used reasonable diligence in disbursing the construction loan and only in the amount that went into the construction of the project. Guaranty Mtg. Co. v. Seitz, 367 So. 2d 438 (Miss. 1979).

A lender advancing construction funds and using reasonable diligence to see that these funds are actually used in payment for materials or other cost of construction has preference over materialmen and laborers who had failed to give notice of their claims to the mortgagee. Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857 (Miss. 1966).

A construction mortgagee has preference over materialmen and laborers only to the extent that its funds actually go into the construction. Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

Mortgagee who makes loan to mortgagor to enable him to purchase land and materials and lumber for the construction of houses thereon and turns money over to mortgagor as he asks for it, knowing that houses are being constructed, but doing nothing to see that such construction is being paid for, has preference over materialmen only to extent that its funds actually go into the construction, when mortgagor fails to use all money advanced by mortgagee for payment of those furnishing materials; such mortgagee should advance proceeds with reasonable diligence in order that holders of statutory liens may not be unjustly defeated in their claims. First Nat'l Bank v. Virden, 208 Miss. 679, 45 So. 2d 268 (1950).

Assignee of mortgagee held entitled to priority over judgment lien of materialman filing petition against mortgagor to enforce lien against house prior to execution of trust deed, where materialman failed to file lis pendens notice and there was no written contract on file, in absence of knowledge by mortgagee of proceedings. Swift & Co. v. Everett, 171 Miss. 410, 157 So. 476 (1934).

Trust deed to secure future advances held prior to mechanics' liens arising during course of construction of building only to extent money secured was used in paying for construction. Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co., 166 Miss. 253, 140 So. 736 (1932).

15. Liens encompassing equipment or machinery.

The seller of a gas heating and cooking plant, installed in a house under a contract whereby title was to remain in the seller as security for payment and was to remain personal property, could not impress a lien against the house and lot, as against the beneficial owner of a prior trust deed on the house, where it was shown that the seller had actual and constructive notice of such deed, and it was not shown that the installation of the plant was necessary to the enjoyment, use or preservation of the house. Mississippi Butane Gas Sys. Co. v. Glisson, 194 Miss. 457, 10 So. 2d 358 (1942).

In materialman's lien case, evidence established that motors and other machinery installed in cottonseed warehouse became part of building and freehold, and, therefore, subject to recorded trust deed, and where mortgagee purchased property at foreclosure sale, he had paramount lien which ripened into ownership as against materialmen's lien claimant, mortgagor, and his purchaser. M.L. Virden Lumber Co. v. Sherrod, 167 Miss. 297, 139 So. 813 (1932), amended, 142 So. 508 (Miss. 1932).

Deed of trust covering land and ginning machinery and "equipment" did not include seed house constructed on leased railroad right of way so as to take precedence over lien of materialman who furnished materials for construction of such seed house without notice of any claim thereto under the deed of trust. Y.D. Lumber Co. v. Refuge Cotton Oil Co., 153 Miss. 302, 120 So. 447 (1929).

16. Waiver or estoppel.

When it is shown that the petitioner has a laborer's lien or materialman's lien upon property constructed or repaired, those who claim to have superior liens as purchasers or encumbrances for a valuable consideration without notice must specifically and affirmatively plead their lien; the burden of proof is upon one who claims to be an encumbrancer for value without notice, and he must show facts which will bring such claim within the exceptions set out in Code 1942, § 356. Enterprise Plumbing Co. v. Bailey Mtg. Co., 209 So. 2d 825 (Miss. 1968).

17. Pleadings; burden of proof.

Mortgagee purchasing at foreclosure sale was bound by waiver in pleadings in favor of materialman's lien claimant of paramount position, if any. M.L. Virden Lumber Co. v. Sherrod, 167 Miss. 297, 139 So. 813 (1932), amended, 142 So. 508 (Miss. 1932).

Materialman held estopped by silence from claiming priority of lien for extras over lien of mortgage of bank lending money with understanding it would have first lien. Planters' Lumber Co. v. Griffin

Chapel M.E. Church, 157 Miss. 714, 128 So. 76 (1930).

Where a mechanic repairs property on which there exists a prior lien which he knows exists, his lien for repairs will be subject to the prior lien, unless the facts show a waiver by the prior lienholder, or an implied contract to subordinate his lien to that of the mechanic. Hollis & Ray v. Isbell, 124 Miss. 799, 87 So. 273, 20 A.L.R. 244 (1921).

RESEARCH REFERENCES

ALR. Right to mechanic's lien as for "labor" or "work," in case of preparatory or fabricating work done on materials intended for use and used in particular building or structure. 25 A.L.R.2d 1370.

Sufficiency of notice, claim, or statement of mechanic's lien with respect to nature of work. 27 A.L.R.2d 1169.

Mechanic's lien for grading, clearing, filling, landscaping, excavating, and the like. 39 A.L.R.2d 866.

Right to mechanic's lien upon leasehold for supplying labor or material in attaching or installing fixtures. 42 A.L.R.2d 685.

Validity and effect of contract provision against mechanic's lien. 76 A.L.R.2d 1087.

Amendment of statement of claim of mechanic's lien as to designation of property owner. 81 A.L.R.2d 681.

Swimming pool as lienable item within mechanic's lien statute. 95 A.L.R.2d 1371.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanics' lien. 3 A.L.R.3d 573.

Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanics' lien, or as extending time for filing such a lien. 51 A.L.R.3d 1087.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold. 59 A.L.R.3d 278.

Enforceability of mechanic's lien attached to leasehold estate against landlord's fee. 74 A.L.R.3d 330.

Removal or demolition of building or other structure as basis for mechanics' lien. 74 A.L.R.3d 386.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman. 75 A.L.R.3d 505.

Who is the "owner" within mechanic's lien statute requiring notice of claim. 76 A.L.R.3d 605.

Mortgagee-lender's duty, in disbursing funds, to protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property. 30 A.L.R.4th 134.

Delivery of material to building site as sustaining mechanic's lien-modern cases. 32 A.L.R.4th 1130.

Liability of purchaser of real estate on mechanic's lien based on goods or labor supplied to vendor but filed after title passed. 33 A.L.R.4th 1017.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 65 et seq.

17 Am. Jur. Pl & Pr Forms (Rev), Mechanics' Liens, Forms 1 et seq.

12A Am. Jur. Legal Forms 2d, Mechanics' Liens §§ 173:9 et seq. (establishment of mechanics' liens).

12A Am. Jur. Legal Forms 2d, Mechanics' Liens §§ 173:57 et seq. (waiver, discharge, subordination, and assignment of mechanics' liens).

CJS. 56 C.J.S., Mechanics' Liens §§ 68 et seq.

Law Reviews. The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 85-7-132. Lien to enforce violations related to oil and gas production.

Every building, well or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, and all fixtures and equipment in the producing unit assigned such well by the Oil and Gas Board shall be liable for any penalty, civil fine or other expense arising from the violation of any statute of this state with respect to the conservation of oil and gas, or any provision of Sections 53-1-1 through 53-1-47 and Sections 53-3-1 through 53-3-21, or any rule, regulation or order made by the board thereunder. The Oil and Gas Board may use the provisions of this chapter to enforce any such lien. The Oil and Gas Board shall perfect such lien in the county or counties where the property or equipment involved in the violation is located. Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof only from the time of filing notice of such lien as provided by Section 85-7-133.

SOURCES: Laws, 1997, ch. 482, § 1, eff from and after passage (approved March 27, 1997).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gas and Oil § 124 et seq.

§ 85-7-133. Chancery clerk to keep record of construction liens.

Each of the several chancery clerks of this state shall provide in his office, as a part of the land records of his county, a record entitled "Notice of Construction Liens" wherein notices under Section 85-7-131 shall be filed and recorded, and such liens, as provided hereunder, shall not take effect unless and until some notation thereof shall be filed and recorded in said record showing a description of the property involved, the name of the lienor or lienors, the date of filing, if and where suit is filed, and if and where contract is filed or recorded.

SOURCES: Codes, Hutchinson's 1848, ch. 45, art. 6 (1); 1857, ch. 39, art. 1; 1871, § 1603; 1880, § 1378; 1892, § 2698; 1906, § 3058; Hemingway's 1917, § 2418; 1930, § 2258; 1942, § 356; Laws, 1926, ch. 150; Laws, 1928, ch. 137; Laws, 1962, ch. 488, §§ 1, 2; Laws, 1964, ch. 291; Laws, 1994, ch. 521, § 39, eff from and after passage (approved March 25, 1994).

Cross References — Duties of clerk of chancery court to keep records, see § 9-5-137.

JUDICIAL DECISIONS

1. In general.

In an action by the purchaser of a house for damages against the builder, the trial court erred in sustaining the builder's demurrer to one count of the complaint charging it with falsely filing a materialmen's lien in 1977 against the property without providing notice to the purchaser as required by § 85-7-197 where the claim was not barred by the one-year statute of limitations set out in § 85-7-201 since the suit had been filed in 1979 within a month after the purchaser first became aware of the lien. The fact that the notice of lien was listed in the "Notice of Construction Liens" book established by § 85-7-133, rather than on the lis pendens docket established by by § 85-7-197, did not excuse the builder from the notice requirement of the latter statute. Hicks v. Greenville Lumber Co., 387 So. 2d 94 (Miss. 1980), overruled on other grounds, Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983).

RESEARCH REFERENCES

ALR. Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

§ 85-7-135. Lien limited to contractor or employee.

The lien declared in Section 85-7-131 shall exist only in favor of the person employed, or with whom the contract is made to perform such labor or furnish such materials or furnish such rental or lease of equipment or render such architectural service, and his assigns, and when the contract or employment is made by the owner, or by his agent, representative, guardian or tenant authorized, either expressly or impliedly, by the owner.

SOURCES: Codes, 1857, ch. 39, art. 2; 1871, § 1604; 1880, § 1379; 1892, § 2699; 1906, § 3059; Hemingway's 1917, § 2419; 1930, § 2259; 1942, § 357; Laws, 1926, ch. 150; Laws, 2010, ch. 372, § 2, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment inserted "or furnish such rental or lease of equipment."

JUDICIAL DECISIONS

1. In general.

Construction liens placed by a mortgagor on his property after the property had been foreclosed were invalid under Miss. Code Ann. §§ 85-7-131 and 85-7-135 because any repairs made by the mortgagor were made without authorization or knowledge of the purchaser at foreclosure. Pepper v. Homesales, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16692 (S.D. Miss. Mar. 3, 2009).

A lumber contractor who made home improvements with the owners' knowledge and consent but without their written permission was entitled to a lien to cover the cost of improvements for which the price had not been paid only to the extent that the improvements could be removed without damaging the owners' interest in the house where an oral construction contract was negotiated with the daughter of the owners who, although she lived in the house and made payments to her parents equivalent to mortgage payments, was neither the beneficiary of a resulting trust in the house nor the vendee of an enforceable contract of sale, and thus, had no interest in the house to which the lien could attach. Brown v. Gravlee Lumber Co., 341 So. 2d 907 (Miss. 1977).

Where the lessor if not expressly, at least impliedly, authorized the lessee to repair the existing building and to construct a new one and therefore make a contract for that purpose with the lumber company, the lumber company acquired a lien on the building for such repair and construction and under this section [Code 1942, § 357] such lien extends to and covers the entire lot on which the buildings stand and the entire curtilage thereto belonging. Burwell v. Planters Lumber Co., 220 Miss. 79, 70 So. 2d 71 (1954).

Where bank which owned golf course agreed to lease it in consideration of lessee's deposit of money with bank which money was to be withdrawn by lessee in payment of repairs, and subsequently on lessee's failure to deposit money bank agreed to accept repairs in lieu of money, laborers and materialmen who contracted with lessee to make repairs and improvements held not entitled to recover from bank for such repairs, where there was no obligation on part of bank express or implied to pay claims. Wenger v. First Nat'l Bank, 174 Miss. 311, 164 So. 229 (1935).

Laborers under the contractor have no lien and cannot impose on the owner any higher duty or further payment than he by his contract has imposed on himself. Herrin v. Warren & Mobley, 61 Miss. 509 (1883); Wenger v. First Nat'l Bank, 174 Miss. 311, 164 So. 229 (1935).

RESEARCH REFERENCES

ALR. Release or waiver of mechanic's lien by general contractor as affecting right of subcontractor or materialman. 75 A.L.R.3d 505.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 65 et seq.

CJS. 56 C.J.S., Mechanics' Liens §§ 72 et seq.

§ 85-7-137. When lien limited to building and estate of tenant.

If such house, building, structure, or fixture be erected, constructed, altered, or repaired at the instance of a tenant, guardian, or other person not the owner of the land, only the house, building, structure, or fixture, and the estate of the tenant or such other person, in the land, shall be subject to such lien, unless the same be done by the written consent of the owner.

SOURCES: Codes, 1857, ch. 39, art. 3; 1871, § 1605; 1880, § 1380; 1892, § 2700; 1906, § 3060; Hemingway's 1917, § 2420; 1930, § 2260; 1942, § 358.

Cross References — Tenant not being bound to pay rent or to restore buildings destroyed, see § 89-7-3.

JUDICIAL DECISIONS

1. Validity.
2. Liability generally.
3. Contracts by non-owning spouse.
4. Enforcement of lien.

1. Validity.

Statute subjecting to mechanic's lien only house, building, etc., erected, constructed, etc., at instance of one not owner of land, unless done by owner's written consent, was not invalid as depriving owner of property without due process. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

2. Liability generally.

A contractor had both an equitable and a statutory lien on a house that it built, even though, unbeknownst to the contractor, the promissory note and deed of trust granting it such liens had been executed by relatives of the true property owner, where the property owner had permitted and acquiesced in the construction of the house on his land and the occupancy thereof by his relatives, who had defaulted on the note. Jim Walter Corp. & Mid-State Homes, Inc. v. Gates, 370 So. 2d 928 (Miss. 1979).

Holders of vendor's lien, not being "owners" within statute limiting lien, unless alterations are made with owner's written consent, need not consent in writing to waive lien. Azwell v. Mohamed, 164 Miss. 80, 143 So. 863 (1932).

Building erected on lot by owners was subject to lien for materials furnished at instance and request of one of owners, though charged to third person's account; however, material furnished to person other than owner for partial construction of building will not support lien on building, although furnished with owner's knowledge and consent. Stubbs v. Capital Paint & Glass Co., 160 Miss. 832, 131 So. 806 (1931), error overruled, 160 Miss. 845, 135 So. 495 (1931).

Structure alone erected by person not owner of land may be subject to mechanic's lien, if detachable from original building without injury to latter. Maryland Cas. Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931).

Any fixture erected or installed by person not owner of land, as well as alterations and repairs on building made by one other than owner, may be subject of mechanic's lien, if detachable from building without injury; but materialman or laborer could not acquire lien on improvement made by mere trespasser without any interest in property, possessory or otherwise. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

Entire house, constructed by person not owner of land, may be subject to mechanic's lien, but not lot, unless work was done with owner's written consent. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

3. Contracts by non-owning spouse.

Residence constructed by wife on lot owned by her was not subject to lien for materials furnished on husband's account, in view of circumstances under which materials were furnished. Stubbs v. Capital Paint & Glass Co., 160 Miss. 832, 131 So. 806 (1931), error overruled, 160 Miss. 845, 135 So. 495 (1931).

Statute, if construed to create mechanic's lien on entire residence owned by wife for materials furnished husband on his own account in constructing additional room, would be unconstitutional as taking property without due process. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

Wife's property was not liable for material used in erection of building on her land, purchased by husband without her consent. Schiaffino v. Christ, 96 Miss. 801, 51 So. 546 (1910).

Where a contract for plumbing on the separate property of the wife is made with the husband and on his credit, without the written consent of the wife, her property cannot be held liable. O'Gwinn v. Winner, 25 So. 354 (Miss. 1899).

4. Enforcement of lien.

A lumber contractor who made home improvements with the owners' knowledge and consent but without their written permission was entitled to a lien to cover the cost of improvements for which the price had not been paid only to the extent that the improvements could be removed without damaging the owners' interest in the house where an oral construction contract was negotiated with the daughter of the owners who, although she lived in the house and made payments to her parents equivalent to mortgage payments, was neither the beneficiary of a resulting trust in the house nor the vendee of an enforceable contract of sale, and thus, had no interest in the house to which the lien could attach. Brown v. Gravlee Lumber Co., 341 So. 2d 907 (Miss. 1977).

Where the owner of a service station did not consent either expressly or impliedly to the erection of the awning at the service station, the seller could not enforce lien on the building or on the land. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

Where the original lessee had assigned its leasehold interest to another, who in turn rented to a person who incurred a debt upon which a mechanic's lien was attempted to be enforced, the original lessee was not a necessary and indispensable party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

The owner of the leasehold interest upon which a mechanic's lien is sought to be enforced is a necessary party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

In an action against sublessee and owner of service station by seller of metal awning which was installed at the request of sublessee, the question of whether the awning could be detached and removed from the service station without impairment and damage to the premises, was for the jury. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

Where husband contracted for erection of building on wife's land, materialman, to enforce his lien against building alone, must make wife and contractor parties. Flake v. Central Hdwe. Co., 96 Miss. 838, 51 So. 461 (1910).

RESEARCH REFERENCES

ALR. Enforceability of mechanic's lien attached to leasehold estate against landlord's fee. 74 A.L.R.3d 330.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 55 et seq.

CJS. 56 C.J.S., Mechanics' Liens §§ 13 et seq.

§ 85-7-139. Contract in writing may be recorded.

When the contract by virtue of which the house, building, structure, fixture, railroad, or railroad embankment may be erected, constructed, altered, or repaired, shall be in writing, it may be acknowledged and recorded as deeds and other instruments. If the contract relate to a house, building, structure, or fixture, it shall be filed for record in the office of the clerk of the chancery court of the county in which the land on which it stands is situated; if the contract relate to a railroad or railroad embankment, it shall be filed for record in the office of the clerk of the chancery court of each county in which the work is to be done; if the contract relate to a boat or water craft, it shall be filed for record in the office of the clerk of the chancery court of the county in which the work is done.

SOURCES: Codes, 1857, ch. 39, art. 5; 1871, § 1607; 1880, § 1382; 1892, § 2701; 1906, § 3061; Hemingway's 1917, § 2421; 1930, § 2261; 1942, § 359.

Cross References — Lien on watercraft, see § 85-7-7.

Recording discharge of lien, see § 85-7-199.

Recording written contracts concerning land, see § 89-5-7.

JUDICIAL DECISIONS

1. In general.

Where materialmen make contract with owner notice in writing need not be given to establish lien. Delta Lumber Co. v. Wall, 119 Miss. 350, 80 So. 782 (1919).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 184 et seq.

CJS. 56 C.J.S., Mechanics' Liens §§ 107 et seq.

§ 85-7-141. Commencement of suit to enforce lien.

Any person entitled to and desiring to have the benefit of such lien shall commence his suit in the circuit or county court of the county in which the property or some part thereof is situated, if the principal of his demand exceeds Two Hundred Dollars ($200.00), within twelve (12) months next after the time when the money due and claimed by the suit became due and payable following the day on which the last of the labor was performed or material or rental or lease equipment was supplied by the person bringing the action, and not after; and the suit shall be commenced by petition, describing with reasonable certainty the property upon which the lien is averred to exist, and setting out the nature of the contract and indebtedness, and the amount thereof; and the plaintiff shall file therewith in all cases, except where the whole work or materials, or both, were furnished in pursuance of a written contract for an aggregate price, a bill of particulars exhibiting the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished; and such suits shall be docketed and conducted as other suits in said court, and may be tried at the first term.

SOURCES: Codes, Hutchinson's 1848, ch. 45, art. 7 (3); 1857, ch. 39, art. 6; 1871, § 1609; 1880, § 1384; 1892, § 2702; 1906, § 3062; Hemingway's 1917, § 2422; 1930, § 2262; 1942, § 360; Laws, 1904, ch. 152; Laws, 2011, ch. 457, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment inserted "or county" following "shall commence his suit in the circuit"; and inserted "following the day on which the last of the labor was performed .... supplied by the person bringing the action.

Cross References — Replevin, attachment, and lien proceedings before justices of the peace, see § 11-9-135.

Right of action on bond, see § 85-7-187.

Landlord's lien, see §§ 89-7-23 et seq.

Seizure of property about to be removed by guardian, see § 93-13-65.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.
3. Actions in general.
4. Pleadings.
5. —Amendment.
6. Judgment.
7. Limitations.

1. Validity.

The statute is constitutional. Richardson v. Warwick, 8 Miss. (7 Howard) 131 (1843).

2. Construction and application.

That the circuit court is the proper situs for suits to enforce a lien does not mean that a chancellor has no jurisdiction to restrain a private person's efforts to hold himself out as possessing such a lien. Cummings v. Davis, 751 So. 2d 1055 (Miss. Ct. App. 1999).

Lien arising automatically under Mississippi construction statute was statutory lien, not judicial lien subject to avoidance as impairing Chapter 7 debtors' homestead exemption, though creditor could not enforce lien without filing action, and creditor filed enforcement action and obtained judgment prepetition; judgment did not transform statutory lien into judgment lien. In re Wiltcher, 204 B.R. 488 (Bankr. S.D. Miss. 1996).

In view of the provisions of Code 1942, § 360, actions brought in the chancery court to enforce laborers' and materialmen's liens were properly transferred by the chancellor to the circuit court, and an interlocutory appeal from the order of transfer should not have been granted. West v. Mechanical Servs., Inc., 216 So. 2d 174 (Miss. 1968).

In a suit under oral contract to recover balance for construction of a porch, there was proof that contractor did not substantially perform the contract, therefore the contractor could not recover on the contract or on quantum meruit, and it was not necessary to file a counterclaim or recoupment. Jackson v. Caffey, 223 Miss. 368, 78 So. 2d 361 (1955).

In suit on contractor's bond, laborers' and materialmen's rights were not measured by provisions of mechanics' lien statute. Continental Cas. Co. v. Crook, 157 Miss. 518, 128 So. 574, 72 A.L.R. 186 (1930).

Contract between materialmen and owner need not be in writing to impress lien on building into which material went. Delta Lumber Co. v. Wall, 119 Miss. 350, 80 So. 782 (1919).

3. Actions in general.

Motion to remand action to state court was denied, where the defendant railway company had removed the plaintiff construction company's action based on diversity jurisdiction; the construction company's argument that Miss. Code Ann. § 85-7-141 restricted federal diversity jurisdiction over cases that involved the enforcement of construction liens was without merit because states had no power to enlarge or restrict federal jurisdiction. Atlas R.R. Constr. Co. v. Columbus & Greenville Ry. Co., 190 F. Supp. 2d 908 (N.D. Miss. 2002).

The suit is not commenced until the petition is filed, though a summons is issued. Christian v. O'Neal, 46 Miss. 669 (1872).

4. Pleadings.

A petition fails to show any cause of action whatever against the owner if it contains no averment of his personal liability to the plaintiff or that at the date he was given notice under the section providing therefor, of plaintiff having furnished materials for use in the building which had not been paid for, he was indebted to the contractor. Smith v. Frank Gardener Hdwe. & Supply Co., 83 Miss. 654, 36 So. 9 (1904).

When a bill of particulars taken in connection with the statements of the petition give as full information of the petitioner's claim as if a specific statement of everything were fully set out in detail, it is sufficient. McLaughlin v. Schaughnessey, 42 Miss. 520 (1869).

5. —Amendment.

A suit to enforce the lien can be amended so as to change it to a suit for debt. Duff v. Snider, 54 Miss. 245 (1876); Noble v. Terrell, 64 Miss. 830, 2 So. 14 (1887).

A suit to enforce the lien may be amended after twelve months from the time the debt became due, so as to set forth more precisely the property covered by the lien; but amendment of suit for debt to suit to enforce lien cannot be done after twelve months from the time the debt became due, as the suit for the debt does not stop the running of the statute against the lien. Dinkins v. Bowers, 49 Miss. 219 (1873).

A suit for the debt may be amended so as to change it to one to enforce the lien. Weathersby v. Sinclair, 43 Miss. 189 (1870).

6. Judgment.

Where the petition wholly fails to state any cause of action against the owner a judgment against him is void and its execution may be enjoined. Smith v. Frank Gardener Hdwe. & Supply Co., 83 Miss. 654, 36 So. 9 (1904).

Adjudications in a judgment by default in a suit to enforce a mechanic's lien must be limited to matters of right, averred in the petition, and cannot be extended by its prayer. Reid v. Gregory, 78 Miss. 247, 28 So. 835 (1900).

7. Limitations.

A materialman's lien established by the circuit court on the property of the defendant would be set aside where the plaintiff's declaration to establish the lien had been filed in the circuit court approximately 20 months after the indebtedness had become due and payable. Central Grain & Supply Co. v. Jesco, Inc., 410 So. 2d 879 (Miss. 1982).

A suit to enforce a materialman's lien created by § 85-7-131 was subject to the statute of limitations provided by § 85-7-141. Further, the running of this one-year limitation period was suspended following the commencement of bankruptcy proceedings and did not commence to run again until the property at issue had been formally abandoned by order of the bankruptcy court. Home Bldg. Mart, Inc. v. Parker, 370 So. 2d 916 (Miss. 1979).

Where the defendant filed notice of a materialman's lien but took no other steps to protect its interest until the property owner filed a bill seeking cancellation of the notice more than two years later, its materialman's lien was barred by the 12-month statute of limitations. King v. Hankins, 209 So. 2d 190 (Miss. 1968).

The twelve month statute of limitations on liens under this section [Code 1942, § 360] does not apply to a mechanic's and materialmen's lien against principal property. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

Parties to a contract have the right to establish the due date of the obligation and the statute of limitation will not begin to run until such due date. Burwell v. Planters Lumber Co., 220 Miss. 79, 70 So. 2d 71 (1954).

Where the claimant commenced his suit in circuit court within twelve months after the money became due and payable to enforce a mechanic's and a materialman's lien and recovered a judgment establishing the lien, and then started a second suit after twelve months had expired for the purpose of having such judgment declared a prior lien to lien claimed under a deed of trust, the circuit court judgment on which relief was sought in the chancery court on the second suit, was not barred by the limitation until seven years after its rendition. Vinson v. Cooley, 54 So. 2d 750 (Miss. 1951).

Contractor's suit to foreclose a lien upon a house, under contract whereby contractor retained a lien until he had been paid in full, instituted more than one year after the last payment had become due, was not barred on theory that the contract merely granted the contractor a mechanic's lien which was barred. Pincus v. Collins, 198 Miss. 283, 22 So. 2d 361 (1945).

There is no requirement that a suit to enforce a materialmen's lien as against personal property shall be filed within twelve months next after the time when the money became due as is necessary when the suit affects real property as such. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

The holder of a deed of trust on certain personal property and a purchaser of such property from a trustee in bankruptcy, setting up the defense of statute of limitations to the enforcement of a mechanic's lien claimed as to such property, were bound to prove that the due date of the indebtedness claimed by the mechanic's lien claimant was such as to cause the mechanic's lien to be barred by the statute without regard to when the labor was actually done or materials furnished. Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

Filing amended bill within twelve months after due date of note for material tolls statute requiring proceeding for enforcement within twelve months. Eagle Lumber & Supply Co. v. Peyton, 145 Miss. 482, 111 So. 141 (1927).

Where there has been a continuous delivery of material, and the time of payment is not fixed by contract, the statute begins to run against the lien from the delivery of the last lot of material. Ehlers v. Elder, 51 Miss. 495 (1875); O'Leary v. Burns, 53 Miss. 171 (1876); Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 189 So. 526 (1939).

Unless suit to enforce the lien be brought within the time allowed by the statute, the lien will be lost. Jones v. Alexander, 18 Miss. (10 S. & M.) 627 (1848); Dinkins v. Bowers, 49 Miss. 219 (1873); Ehlers v. Elder, 51 Miss. 495 (1875); O'Leary v. Burns, 53 Miss. 171 (1876).

The time for payment of the debt, as fixed by the contract, cannot be postponed by subsequent agreement so as to extend the lien. Jones v. Alexander, 18 Miss. (10 S. & M.) 627 (1848); Ehlers v. Elder, 51 Miss. 495 (1875).

RESEARCH REFERENCES

ALR. Who is the "owner" within mechanic's lien statute requiring notice of claim. 76 A.L.R.3d 605.

Am Jur. 51 Am. Jur. 2d, Liens §§ 83 et seq.

53 Am. Jur. 2d, Mechanics' Liens §§ 333 et seq.

17 Am. Jur. Pl & Pr Forms (Rev), Mechanics' Liens, Forms 101 et seq. (enforcement of lien).

CJS. 53 C.J.S., Liens §§ 32 et seq.

56 C.J.S., Mechanics' Liens §§ 296 et seq.

§ 85-7-143. Parties to the suit.

All persons having an interest in the controversy, and all persons claiming liens on the same property, by virtue of this chapter, shall be made parties to the suit; and should any necessary or proper party be omitted, he may be brought in by amendment, on his own application or that of any other party interested; and claims of several parties having liens on the same property may be joined in the same action.

SOURCES: Codes, 1857, ch. 39, art 7; 1871, § 1610; 1880, § 1385; 1892, § 2703; 1906, § 3063; Hemingway's 1917, § 2423; 1930, § 2263; 1942, § 361.

JUDICIAL DECISIONS

1. Necessary and proper parties generally.
2. Intervention by interested person.
3. Scope and effect of judgments.

1. Necessary and proper parties generally.

The conditional seller of an automobile is a necessary party to a proceeding to enforce a mechanic's lien for repairs. Mississippi Motor Fin., Inc. v. Thomas, 246 Miss. 14, 149 So. 2d 20 (1963).

Where the original lessee had assigned its leasehold interest to another, who in turn rented to a person who incurred a debt upon which a mechanic's lien was attempted to be enforced, the original lessee was not a necessary and indispensable party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

The owner of the leasehold interest upon which a mechanic's lien is sought to be enforced is a necessary party to the suit. Jay Indus. v. Powell, 220 Miss. 372, 71 So. 2d 193 (1954).

One claiming to be a bona fide holder of deed of trust against real property is proper party, under this section [Code 1942, § 361], to suit to enforce materialmen's lien on same property. Bullock v. Hans, 208 Miss. 41, 43 So. 2d 670 (1949).

Where in suit to enforce a mechanic's lien for labor done on a wrecked automobile, the bill of complaint alleged that credit company claimed some interest in such automobile, and such credit company was served with process by publication and decree pro confesso was taken against such company upon its failure to appear, and on appeal credit company was permitted to file forthcoming bond, appeal could not be defeated on ground that credit company was not a party to the suit. Universal Credit Co. v. Linn Motor Co., 195 Miss. 565, 15 So. 2d 694 (1943).

Holder of deed of trust was necessary party to proceedings to establish and enforce mechanic's lien. Parsons v. Foster, 154 Miss. 363, 122 So. 387 (1929).

To a suit to enforce the lien, under the statute, all persons claiming similar liens on the same property must be made parties or their rights will not be affected, whether suits be pending to enforce the liens of such others or not. Buntyn v. Shippers' Compress Co., 63 Miss. 94 (1885).

Both the administrator and heirs are necessary parties to the suit to enforce the lien on the land of the deceased debtor, under the statute. Guerrant v. Dawson, 34 Miss. 149 (1857).

Persons who claim the land adversely to those with whom the mechanic or materialman made his contract, are not proper parties to the suit to enforce the lien, as their interest will not be affected and cannot be adjudicated. Falconer v. Frazier, 15 Miss. (7 S. & M.) 235 (1846); English v. Foote, 16 Miss. (8 S. & M.) 444 (1847); Laud v. Muirhead, 31 Miss. 89 (1856).

2. Intervention by interested person.

Where one, who had made repairs to a truck, intervened in an action by subsequent repairmen against the conditional vendee of the truck to recover for their labor and to impress a lien upon the truck and, the truck having been condemned to be sold to pay for all the repairs, took an assignment of the subsequent repairmen's lien and their interest in the judgment and then purchased the truck at the sale thereunder, thereby acquiring the vendee's title, which was the ownership of the truck subject to the lien of the conditional sales contract, the mechanic's liens were not merged into the judgment, but remained in effect as against the vendor's assignee, and the assignee was entitled to dispossess the holder of the mechanic's liens only when it had paid him what the purchaser of the truck owed him, if anything, for the repairs to it. GMAC v. Shoemake, 192 Miss. 446, 6 So. 2d 309 (1942).

3. Scope and effect of judgments.

Materialmen's lien judgment solely against owner who had theretofore parted with all interest in property was void of any real substance or force. Hervey v. Commercial Bank of Clarksdale, 152 Miss. 894, 120 So. 463 (1929).

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Liens § 86.

53 Am. Jur. 2d, Mechanics' Liens §§ 353 et seq.

CJS. 56 C.J.S., Mechanics' Liens §§ 322 et seq.

§ 85-7-145. Summons of defendants.

The defendants shall be summoned, as in other actions at law, to appear and defend the action; and in case any necessary party defendant shall be a non-resident of or absent from the state, or cannot be found, he may be made a party by publication, as in cases of non-resident or absent defendants in chancery, requiring him to appear on a day to be therein named; and in default of appearance, the same proceedings shall be had as if such defendant had been duly summoned and made default.

SOURCES: Codes, 1857, ch. 39, art. 8; 1871, § 1611; 1880, § 1386; 1892, § 2704; 1906, § 3064; Hemingway's 1917, § 2424; 1930, § 2264; 1942, § 362.

Cross References — Bonds securing public construction contracts and suits thereon, see §§ 31-5-51 et seq.

Process in suits instituted to enforce liens, see § 85-7-195.

JUDICIAL DECISIONS

1. In general.

As regards suits under statute authorizing materialmen and laborers to bring suit on bond of contractor with state within one year after final settlement or abandonment of contract and publication of notice thereof, the parties interested are to be summoned as provided under this section. [Code 1942, § 362]. United States Fid. & Guar. Co. v. Plumbing

Whsle. Co., 175 Miss. 675, 166 So. 529 (1936).

This section [Code 1942, § 362] is a general section governing the summoning of parties touching controversies respecting statutory liens. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

RESEARCH REFERENCES

ALR. Sufficiency of notice, claim, or statement of mechanic's lien with respect to nature of work. 27 A.L.R.2d 1169.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens § 368.

§ 85-7-147. Defenses and counterclaims.

The defendants, or any of them, by answer to the petition, may make any defense they may have against the demand of the plaintiff, and also any counter-claim against him touching the subject-matter of the suit. And should any defendant claim to have a lien upon the same property, for materials furnished or labor done thereon, he may present the same by his answer; and the cause shall be at issue without a replication, and the parties shall be confined at the trial to the cause of action and defense set forth in the pleadings.

SOURCES: Codes, 1857, ch. 39, art. 9; 1871, § 1612; 1880, § 1387; 1892, § 2705; 1906, § 3065; Hemingway's 1917, § 2425; 1930, § 2265; 1942, § 363.

Cross References — Trial of right of property, see §§ 11-23-7 et seq.

JUDICIAL DECISIONS

1. In general.

In proceeding to enforce materialmen's lien, it is duty of trial court to confine parties to cause of action and defense set forth in pleadings, and supreme court has same duty on appeal. Bullock v. Hans, 208 Miss. 41, 43 So. 2d 670 (1949).

Holder of deed of trust on property, as a necessary party to a suit to establish mechanic's lien on such property, had the right to defend under this section [Code 1942, § 363] and to counterclaim against plaintiff with respect to subject matter of the suit. Parsons v. Foster, 154 Miss. 363, 122 So. 387 (1929).

Permitting defendant to reopen case and make proof of recoupment not authorized by pleading, was error. Carter v. Collins, 151 Miss. 1, 117 So. 336 (1928).

RESEARCH REFERENCES

ALR. Claim barred by limitation as subject to setoff, counterclaim, recoupment, cross bill, or cross action. 1 A.L.R.2d 630.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman. 75 A.L.R.3d 505.

Am Jur. 51 Am. Jur. 2d, Liens § 88.

53 Am. Jur. 2d, Mechanics' Liens §§ 380, 381.

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Forms 118, 119, 134, 135, 148-150 (answers in proceedings to enforce mechanics' liens).

§ 85-7-149. Issues and trial.

The circuit court may direct the formation of such issues, to be tried before a jury, as may be necessary for the determination of all matters controverted in the pleadings; and such issues shall be tried by the same rules of evidence and practice that prevail in other cases at law; and the court may set aside verdicts and grant new trials and give judgments according to the justice of the case.

SOURCES: Codes, 1857, ch. 39, art. 10; 1871, § 1613; 1880, § 1388; 1892, § 2706; 1906, § 3066; Hemingway's 1917, § 2426; 1930, § 2266; 1942, § 364.

JUDICIAL DECISIONS

1. In general.

In an action to enforce a lien for labor and materials furnished in construction of a boardinghouse, the testimony as to the statements of contractor that he ordered materials and was dealing with the claimants because the property owner referred him to them was not objectionable on the ground of hearsay because this testimony was admissible as an independently relevant fact to explain the circumstances under which the claimants furnished materials for which they were claiming. Handshoe v. Daly, 211 Miss. 189, 51 So. 2d 230 (1951).

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Liens § 92.

53 Am. Jur. 2d, Mechanics' Liens §§ 398 et seq.

16 Am. Jur. Pl & Pr Forms (Rev) Liens, Forms 81 et seq. (judgments foreclosing liens).

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Form 3 (instruction to jury as to necessity for valid contract or consent).

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Forms 171 et seq. (judgments or decrees).

CJS. 56 C.J.S., Mechanics' Liens §§ 365 et seq.

§ 85-7-151. Judgment in suits on builder's and contractor's liens; costs and attorney's fees.

In case judgment be given for the plaintiff against the builder, it shall, in case he was actually served with process, be entered against him generally, with costs, as in other cases, and with attorney's fees as provided below, and with a special order for the sale of the property upon which the lien exists for the payment thereof, and for an execution, as in other cases, for the residue of what may remain unpaid, after the sale of the property; and if the defendant be brought in by publication only, and have not appeared, the judgment shall be entered specially for the debt and costs, to be made of the property in the petition described; and in case a general judgment be not given against the builder, such proceedings or recovery shall not be a bar to any suit for the debt, except for the part thereof actually made under such recovery. When judgment is rendered in favor of the plaintiff against the builder, the builder shall be liable for reasonable attorney's fees to be set by the judge for the prosecution and collection of such claim.

The provisions of this section allowing the award of attorney's fees shall only apply to actions the cause of which accrued on or after July 1, 1987.

SOURCES: Codes, 1857, ch. 39, art. 11; 1871, § 1614; 1880, § 1389; 1892, § 2707; 1906, § 3067; Hemingway's 1917, § 2427; 1930, § 2267; 1942, § 365; Laws, 1987, ch. 392, § 1, eff from and after July 1, 1987.

JUDICIAL DECISIONS

1. In general.

This section did not apply where (1) a contractor did not bring suit against property owners to enforce the construction lien he had filed against their property, but, instead, brought only a breach of contract action, (2) the issue of the lien was addressed first in the owners' counterclaim, where they asserted that the contractor had slandered their title by filing the lien, and (3) that claim was withdrawn by the owners at trial. Garner v. Hickman, 733 So. 2d 191 (Miss. 1999).

A suit to establish a materialman's lien may be combined with a suit for a personal judgment as an alternative in the declaration, and the declaration need not set forth the allegations in separate counts. Evans v. Central Serv. & Supply Co., 226 So. 2d 616 (Miss. 1969).

RESEARCH REFERENCES

ALR. Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 A.L.R.3d 475.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct. 69 A.L.R.4th 974.

Attorney's retaining lien: what items of client's property or funds are not subject to lien. 70 A.L.R.4th 827.

Am Jur. 51 Am. Jur. 2d, Liens § 93.

53 Am. Jur. 2d, Mechanics' Liens §§ 409 et seq.

16 Am. Jur. Pl & Pr Forms (Rev) Liens, Forms 81 et seq. (judgments foreclosing liens).

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Forms 171 et seq. (judgments or decrees).

CJS. 56 C.J.S., Mechanics' Liens §§ 375 et seq.

§ 85-7-153. Execution.

When the judgment shall be against the house, building, structure, or fixture and land, or against the same without the land, or against a railroad, or railroad embankment, a special writ of execution shall issue, to make the amount recovered by sale of the property, which shall be described therein; and when both a general and special judgment shall be given, both writs may be issued, either separately or combined in one, or one may be issued after the return of the other for the whole or the residue, as the case may require.

SOURCES: Codes, 1857, ch. 39, art. 12; 1871, § 1615; 1880, § 1390; 1892, § 2708; 1906, § 3068; Hemingway's 1917, § 2428; 1930, § 2268; 1942, § 366.

Cross References — Issuance and return of executions, see § 13-3-113.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 366] bears out the construction of Code 1906, § 3060 (Code 1942, § 358) that if additions and repairs to property owner's building made at the request of another can be removed without injury to the building, such additions and repairs are subject to the lien of the statute, while if they cannot be so removed, the lien of the statute does not attach. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens § 421.

§ 85-7-155. Sale of house, building, etc., with or without land; procedure; purchaser's estate in land.

If such special writ of execution be for the sale of a house, building, structure, or fixture and the land, or for the sale of the same without the land, the officer shall levy on, advertise, sell, and convey the same as in other cases of land levied on for debt; and if the sale be of the house, building, structure, or fixtures alone, and the same shall have been erected or constructed and put on the land subsequently to a former encumbrance on the land, the purchaser shall acquire the same free from such former encumbrance, and his purchase shall authorize him to enter and remove such house, building, structure, or fixture from the land with reasonable dispatch; but if the house, building, structure or fixture so sold, or sold with the land, shall have been simply altered or repaired subsequently to a former encumbrance on the land, the purchaser shall acquire the same subject to such encumbrance, unless the encumbrancer consented in writing to the alteration or repairs, in which case the house, building, structure, or fixtures so altered or repaired shall be sold free from such encumbrance, and with the right in the purchaser to enter and remove the same. If the land be sold also, the purchaser shall acquire such estate therein as the owner or builder, as the case may be, had at the time the lien to enforce which the sale is made attached thereon, or at any time afterwards, subject to prior encumbrances; but buildings, structures, or fixtures erected or constructed and put on the land subsequently to prior encumbrances shall pass to the purchaser as if the sale were of such buildings, structures, or fixtures alone.

SOURCES: Codes, 1857, ch. 39, art. 13; 1871, § 1616; 1880, § 1391; 1892, § 2709; 1906, § 3069; Hemingway's 1917, § 2429; 1930, § 2269; 1942, § 367.

Cross References — Where sales under execution are made, see §§ 13-3-161 et seq.

JUDICIAL DECISIONS

1. In general.
2. Right to enter and remove.

1. In general.

In an action to determine the priority between a mechanic's lien and first and second deeds of trust, the mechanic's lien asserted by a contractor, who had repaired a fixture on the premises, was subordinate to the first deed of trust on the property, where the owner of that deed of trust did not consent in writing to the alteration or repair of the fixture, but had priority over the rights of purchasers of a trustee's deed which foreclosed a second deed of trust, where the purchasers of that deed bought the property at foreclosure of the second deed with notice of the lien's existence. Ziller v. Atkins Motel Co., 244 So. 2d 409 (Miss. 1971).

When in a suit for a mechanic's and materialmen's lien on heating equipment installed on hotel premises the contract was not recorded, and no notice of lis pendens given or writ of seizure of the property issued, and the property was claimed by the grantee of the realty from a purchaser at foreclosure of a prior deed of trust as a purchaser for value without notice of the unpaid lien, the burden was on such grantee to prove that he was a purchaser for value without notice, and in the absence of such proof, the lien claimant was entitled to recover. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

If a contract under which material was installed on realty was not recorded, and no lis pendens notice was filed at or after the time suit to enforce the mechanic's and materialmen's lien was instituted, and if the material should be considered as real estate fixtures, and if the grantee of the realty from a purchaser at foreclosure at a prior deed of trust was a purchaser for value without actual notice of the lien, such grantee would take the property free of the lien. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

Under this section [Code 1942, § 367], heating equipment installed on hotel premises and easily detachable therefrom without substantial impairment to the premises, would still be subject to a mechanic's and materialmen's lien notwithstanding a prior deed of trust covering the property, but such lien would not include the land. Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940).

This section [Code 1942, § 367] bears out the construction of Code 1906, § 3060 (Code 1942, § 358) that if additions and repairs to property owner's building made at the request of another can be removed without injury to the building, such additions and repairs are subject to the lien of the statute, while if they cannot be so removed, the lien of the statute does not attach. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930).

Purchaser under mechanic's lien gets new building free of prior encumbrances. Big Three Lumber Co. v. Curtis, 130 Miss. 74, 93 So. 487 (1922).

A court of chancery will enforce, and it is the proper forum in which to assert the rights of one who owns buildings situated on land of another. Otley v. Haviland, Clark & Co., 36 Miss. 19 (1858); Watkins v. Owens, 47 Miss. 593 (1873).

2. Right to enter and remove.

The statute contemplates a prompt exercise of the right to enter and remove buildings, and a failure to do so is a waiver of it; What is "reasonable dispatch" is determinable by circumstances, but delay for two years, in the absence of explanation, will be conclusive of a waiver. Priebatsch v. Third Baptist Church, 66 Miss. 345, 6 So. 237 (1889).

A materialman recovering a special judgment, and acquiring title to the house by purchase, but who does not remove it for two years, waives his right to remove it. Priebatsch v. Third Baptist Church, 66 Miss. 345, 6 So. 237 (1889).

RESEARCH REFERENCES

ALR. Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest. 50 A.L.R.3d 944.

Am Jur. 51 Am. Jur. 2d, Liens § 94.

53 Am. Jur. 2d, Mechanics' Liens §§ 330 et seq.

16 Am. Jur. Pl & Pr Forms (Rev) Liens, Forms 91 et seq. (sale of property following judgment of foreclosure).

12 Am. Jur. Legal Forms 2d, Liens §§ 165:26, 165:27 (notice of sale to satisfy lien).

CJS. 56 C.J.S., Mechanics' Liens §§ 405, 406 et seq.

§ 85-7-157. Sale of railroad land or buildings; procedure; purchaser's estate property.

If the special writ of execution be for the sale of a railroad or railroad embankment, the officer shall levy on, advertise, sell, and convey the same as in case of land levied on for debt; and where the property may be in several counties, the officer may sell the same and the right of way, and all depots and other buildings used or connected therewith, as if the same were situated wholly within his county, and the purchaser shall acquire the property free from all prior encumbrances saving the rights of those having concurrent liens under this chapter.

SOURCES: Codes, 1880, § 1391; 1892, § 2710; 1906, § 3070; Hemingway's 1917, § 2430; 1930, § 2270; 1942, § 368.

LIEN ON AMOUNT DUE CONTRACTOR

SEC.	
85-7-181.	Amount due contractor or master workman may be bound by written notice; suit.
85-7-183.	Assignments by contractor prohibited.
85-7-185.	Bond; provisions; right to intervene in action on bond.
85-7-187.	Bond; persons with right of action.
85-7-189.	Bond; suit on; commencement.
85-7-191.	Bond; suit on; only one action permitted; intervention.
85-7-193.	Bond: judgment; pro rata recovery where funds insufficient.
85-7-195.	Process.
85-7-197.	Claim may be recorded in lis pendens record.
85-7-199.	Discharge of lien to be noted of record.
85-7-201.	Penalty for false notice; action to expunge.

§ 85-7-181. Amount due contractor or master workman may be bound by written notice; suit.

When any contractor or master workman shall not pay any person who may have furnished materials, labor or rental or lease equipment used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, the amount due by him to any subcontractor therein, or the wages of any journeyman, rental or lease equipment supplier or laborer employed by him therein, any such person, subcontractor, journeyman, laborer or rental or lease equipment supplier may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor, journeyman, rental or lease equipment supplier or laborer who might lawfully have given notice in writing to the owner hereunder, and if after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workman and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen, rental or lease equipment suppliers or materialmen, so far as known, parties to the suit (and any such party not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be liable for costs; but if the owner, when sued, with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs, and reasonable attorney's fees, according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

The provisions of this section allowing the award of attorney's fees shall only apply to actions the cause of which accrued on or after July 1, 1987.

SOURCES: Codes, 1880, § 1381; 1892, § 2714; 1906, § 3074; Hemingway's 1917, § 2434; 1930, § 2274; 1942, § 372; Laws, 1904, ch. 153; Laws, 1918, ch. 128; Laws, 1987, ch. 392, § 2; Laws, 2010, ch. 372, § 3, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment, throughout the section, inserted "rental or lease equipment supplier" or similar language; and in the first sentence, inserted "labor or rental or lease equipment."

Cross References — Arbitration of controversies arising out of construction contracts and related agreements, and failure of arbitration to effect liens, see § 11-15-101.

Lis pendens records and notice, see §§ 11-47-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Persons entitled to lien.
3. Property or fund subject to lien.
4. —Public funds.
5. —Money due contractor.
6. —Money paid contractor.
7. —Money due or paid to others.
8. Extent of lien.
9. —Notice—generally.
10. —Sufficiency.
11. Rights in fund; distribution.
12. Release of fund.
13. Suits to enforce lien.

1. In general.

Only if a contractor was a general contractor and the subcontractors were subcontractors, would they be required to utilize the protections afforded by Miss. Code Ann. § 85-7-181, and if they did not employ such protection, the burden of the loss would be borne by them; however, if they established the existence of an agency relationship between the insurer and the contractor, their status as third-party beneficiaries of the contract, the contractor's lack of general contractor status, or the invalidity of the contract, then the insurer's payments to the contractor would not extinguish its debt to the subcontractors. Aladdin Constr. Co. v. John Hancock Life Ins. Co., 914 So. 2d 169 (Miss. 2005).

Where a plumber had been named as an interpleader defendant, the plumber was not required to have sought statutory remedies for the outstanding balance on its contract before it could recover funds that had been interpled. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377 (Miss. Ct. App. 2004).

As individual subcontractors had not served stop notices on a homeowner, the trial court erred in ordering the homeowner to pay the subcontractors' outstanding invoices. Timms v. Pearson, 876 So. 2d 1083 (Miss. Ct. App. 2004).

Once a suit is filed, all interested persons, so far as known, must be made a party to the suit. Amerihost Dev., Inc. v. Bromanco, Inc., 786 So. 2d 362 (Miss. 2001).

Advance payments by an owner to a contractor, whether intentional or unintentional, as long as they extinguish the debt and predate the stop notice, preclude liability on the part of the owner to subcontractors to whom the general contractor was indebted for labor or materials furnished. Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613 (Miss. 1969).

A subcontractor who failed to avail himself of the protection provided by this section [Code 1942, § 372] at a time when there was an indebtedness due from the owners to the general contractor cannot thereafter recover from the owners on the contention that they must bear the loss caused by the malfeasance of the general contractor for the reason that they were in the best position to have prevented the loss from occurring. Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613 (Miss. 1969).

Code 1942, §§ 372, 373, and 374 are interdependent and must be considered together as providing one plan of protection for certain persons furnishing materials or performing labor for the improvement of the property of another. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

A lien under this section [Code 1942, § 372] is purely a creature of the statute and did not exist at common law, and in its absence materialmen and laborers would be only general creditors of the contractor. Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951).

This section [Code 1942, § 372] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the 14th Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291

U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

State statutes providing for lien in favor of subcontractors, laborers, and materialmen were applicable to construction of interstate railroad and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

2. Persons entitled to lien.

The statute applies only to materialmen or subcontractors of the general contractor, and subcontractors or materialmen to another subcontractor are not entitled to recovery under the statute; only those with a direct contractual relation with the owner's contractor can file an effective stop notice, and then only to require the retention of funds owed by the owner to the contractor. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254 (Miss. Ct. App. 2000).

Mississippi courts have observed that action by a third party contractor against owner is in derogation of common law, and Mississippi Supreme Court has found language similar to the language in § 85-7-181 to exclude suppliers of rental equipment; therefore District Court properly applied Mississippi law to hold that this section applies only to services or supplies actually incorporated into a structure and cannot be invoked by a supplier of merely rental equipment. Coatings Mfrs., Inc. v. DPI, Inc., 926 F.2d 474 (5th Cir. 1991).

The fact that a company was a co-owner of a project under construction had no bearing on whether it was the prime contractor for the purpose of determining whether a material supplier was entitled to a lien under § 85-7-181. The chancellor therefore erred in relying in part on the fact that the company was a co-owner in finding that it was not the prime contractor; the chancellor should have looked at the company's activities isolated from its ownership, so that if the company's activities were such that if it was not the owner it would have been found to be the contractor, then the chancellor should have found that it was the contractor regardless of the fact that it was a co-owner. To disallow owners from being contractors, when in fact they are, would serve to inequitably subordinate claims of other parties to those subcontractors or material suppliers who were in reality supplying a subcontractor rather than a contractor. Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc., 589 So. 2d 1245 (Miss. 1991).

A supplier of materials to a subcontractor had no right to acquire a lien under Code 1942, § 372, and was in no position to invoke Code 1942, § 373 to invalidate assignments made by the general contractor to a bank. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

This section [Code 1942, § 372] confers a lien by subrogation only to the rights of the contractor, and in order for a lien to arise and become fixed there must first be written notice served upon the owner and at the time of his receipt of such notice the owner must be indebted to his contractor. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

The right to acquire a lien under this section [Code 1942, § 372] is limited to persons engaged by the original contractor, and does not extend to others who supply materials or labor at the request of a subcontractor. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

Where a lender advanced to a contractor $7,500 and in return took a note and a deed of trust from the equitable owner, the lender was entitled to a priority of lien to the extent of $7,500, over the claims of subcontractors and materialmen who gave no notices until the beginning of an action for foreclosure of trust deed. Strangi v. Wilson, 223 Miss. 122, 77 So. 2d 697 (1955).

This section [Code 1942, § 372] confers a lien by subrogation to the rights of the independent contractor, and the materialmen or laborers are entitled to a lien only when the contractor is entitled to one and there is something due or to become due to the principal contractor from the owner. Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951).

As between the one financing a construction job under an agreement with the principal contractor and those who, upon payment of their claims, assigned them to such lender, the assignments would control, but as to other persons, and as to the funds paid into court by the owner in an interpleader proceeding, he would not be entitled to a lien against the funds or the building, or the money paid under the agreement with the principal contractor prior to the abandonment of the contract. Sadler v. Glenn, 190 Miss. 112, 199 So. 305 (1940).

In an interpleader proceeding wherein a contest arose between materialmen and one who financed a construction job under an agreement with the principal contractor, who abandoned the job before its completion, payment of labor and other claims by such lender under such agreement and the assignment to him of such claim did not entitle him to a lien hereunder, or to subrogation to the rights of the persons whose claims he paid in accordance with the agreement. Sadler v. Glenn, 190 Miss. 112, 199 So. 305 (1940).

Since the public roads and property of a county are not subject to the lien created under this section [Code 1942, § 372] in favor of laborers and subcontractors, subcontractors did not, by filing a notice with the board of supervisors claiming a lien, acquire a lien on funds in the hands of the county authorities. McGraw v. Board of Supvrs., 125 Miss. 420, 87 So. 897 (1921).

Superintendent employed by contractor whose chief duties are to employ, pay off, and discharge laborers and supervise them at work, is not a laborer within the meaning of this section [Code 1942, § 372], and he is not entitled to its benefits, although he occasionally assisted in laying cement blocks. Williams v. Alcorn Elec. Light Co., 98 Miss. 468, 53 So. 958, Am. Ann. Cas. 1913B,137 (1911).

3. Property or fund subject to lien.

In an action involving priority of liens if it becomes necessary for the court to order sale of lots to satisfy the purchase money lien, provision should be made in the decree for marshalling of the assets so as to protect the rights of lender whose mortgage lien covered only one lot and improvements located thereon. Strangi v. Wilson, 223 Miss. 122, 77 So. 2d 697 (1955).

4. —Public funds.

Funds in the hands of the county owing principal contractor are not subject to the lien of subcontractors, since public roads and property of the county are not subject to the lien created in favor of subcontractors and laborers. McGraw v. Board of Supvrs., 125 Miss. 420, 87 So. 897 (1921).

5. —Money due contractor.

Where the owner failed to prove the extent of his interest in funds in his hands, where this interest arose from the failure of the contractor to complete the work, the balance due the contractor became subject to the lien of the materialman who had given a timely stop notice to the owner under this section [Code 1942, § 372]. Sherwin-Williams Co. v. Smith, 253 Miss. 769, 179 So. 2d 263 (1965).

The burden is upon all parties claiming a part of the funds in the hands of the owner, belonging to the contractor, to show their interest, if any, in the funds due the contractor remaining unpaid and held by the owner. Sherwin-Williams Co. v. Smith, 253 Miss. 769, 179 So. 2d 263 (1965).

Materialman's right to subject money owed builder by the owner to payment of builder's debt to him is not affected by the fact that the owner has given the builder a note and deed of trust for the amount which remains unpaid and unassigned to any third person. Fortenberry v. Wilson, 248 Miss. 153, 158 So. 2d 704 (1963).

The fact that a contractor limited his claim against the owner in a materialmen's and laborers' action asserting statutory liens on money owed the contractor would not preclude plaintiffs from showing that the owner owed the contractor more than the limited claim. Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951).

Owner employing mechanic to furnish material and improve house is not, nor is his house, subject to materialmen's lien unless indebted to mechanic when notified and credited with any sum paid or agreed to be paid others before notice. Lake v. Brannin, 90 Miss. 737, 44 So. 65 (1907).

Materialman, asserting lien, could not recover against owner where petition failed to aver either personal liability of the owner, or that at the date notice was served on him, the owner was indebted to the contractor. Smith v. Frank Gardener

Hdwe. & Supply Co., 83 Miss. 654, 36 So. 9 (1904).

A suit by one who has furnished to a contractor material used in the building of a house to enforce a materialman's lien, under this section [Code 1942, § 372], cannot be maintained without showing that the owner of the building is indebted to the contractor or was indebted to him at the time of the service of the notice. Rothrock Constr. Co. v. Port Gibson Mfg. Co., 80 Miss. 517, 32 So. 116 (1902), reh'g denied, 80 Miss. 517, 32 So. 484 (1902).

6. —Money paid contractor.

Where notice was not given by the materialman to the owner until after the owner had in good faith made final settlement with his contractor by issuing the contractor his check, which the contractor in good faith had negotiated, the owner did not owe the materialman the duty to stop payment on its check issued to the contractor. Corrugated Indus., Inc. v. Chattanooga Glass Co., 317 So. 2d 43 (Miss. 1975).

In a proceeding on a materialman's lien, the owners were properly charged with an amount paid, after stop notice, by the owner for re-papering work defectively done by the contractor, which defects it was the contractor's duty to remedy, and for which he was not entitled to extra pay. McNair v. M.L. Virden Lumber Co., 193 Miss. 232, 4 So. 2d 684 (1941).

7. —Money due or paid to others.

Supplier who provided materials to a contractor on a job site was not entitled to recover the value of unpaid materials from the owner in a breach of contract action. The supplier could have recovered payment by serving the owner with a stop notice pursuant to Miss. Code Ann. § 85-7-181. Serv. Elec. Supply Co. v. Hazlehurst Lumber Co., 932 So. 2d 863 (Miss. Ct. App. 2006).

Subcontractors had no right under the statute to recover funds owed to a retail store by a shopping center owner to pay a portion of the cost of the construction of the interior of the store since such funds were entirely outside the owner-contractor-subcontractor hierarchy. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254 (Miss. Ct. App. 2000).

Where the owner has assumed in good faith, and with the agreement of the contractor, an obligation of the contractor, even though the contractor is secondarily liable thereon, the owner is entitled to credit for the amount of the assumed obligation on his contract price as against materialmen asserting liens. Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951).

Payment by owner to principal materialman, who furnished materials and financed contractor in construction of house, held not, in absence of notice, impressed with trust for other laborers and materialmen. White's Lumber & Supply Co. v. Rea, 158 Miss. 695, 131 So. 259 (1930).

Money owing from owner to persons other than contractor for materials under independent undertaking is not subject to claims of materialmen for materials furnished contractor, notwithstanding such money was in hands of owner at the time notice was served on owner by materialmen. Lake v. Brannin, 90 Miss. 737, 44 So. 65 (1907).

8. Extent of lien.

Where the statute permits a materialman to bind the amount due the contractor by written notice to the owner, the owners are liable to the materialman only for the remaining unpaid contract price in their hands at the time of notice. Deposit Guar. Bank & Trust Co. v. J.F. Weaver Lumber Co., 215 Miss. 183, 60 So. 2d 598 (1952).

A materialman was entitled to recover judgment against the owner to the extent of the amount of money in the hands of the owner owing to the contractor at the time the statutory notice was received by the owner, notwithstanding an offer of proof that the owner avoided service of notice in order to pay off other materialmen and persons who had supplied labor. City Coal & Lumber Co. v. Gulf Ref. Co., 184 Miss. 260, 185 So. 250 (1938).

9. —Notice—generally.

Subcontractors who built a sanctuary could not recover from the church costs owed to them by the general contractor; because they failed to timely file stop notices under Miss. Code Ann. § 85-7-181, they were simple creditors of the general contractor. Summerall Elec. Co. v. Church of God at Southaven, 25 So. 3d 1090 (Miss. Ct. App. 2010).

The filing of a stop-payment notice benefits only the subcontractor(s) giving actual notice prior to the time the owner pays the prime contractor and does not benefit all subcontractors and suppliers, including those who failed to give a stop payment notice before the owner makes a payment to the general contractor. Amerihost Dev., Inc. v. Bromanco, Inc., 786 So. 2d 362 (Miss. 2001).

This section does not confer the rights stated within the section upon all subcontractors, materialmen and suppliers who worked on a project, without regard to whether each has availed himself individually of the express terms of this section's notice requirements, once the owner is in receipt of at least one notice from any one of them. Amerihost Dev., Inc. v. Bromanco, Inc., — So. 2d —, 2000 Miss. App. LEXIS 61 (Miss. Ct. App. Feb. 8, 2000), affirmed by 786 So. 2d 362, 2001 Miss. LEXIS 92 (Miss. 2001).

Although the mailing of laborers' wage checks by a drilling contractor to the owner might be considered notice in writing by the laborers of their claims, they would not be entitled to the benefits of this section [Code 1942, § 372] where there was nothing to show that they had made timely claim to the benefits afforded thereunder. Geo. H. Jett Drilling Co. v. Tibbits, 234 F. Supp. 583 (W.D. La. 1964).

Where a construction contract between owner of premises and prime contractor did not require that the owner pay anything before the completion of the project, the owner may make payments to the prime contractor during progress of the work and he will not be held liable as to payments to subcontractors and materialmen who give statutory stop notice subsequent to making of payments. Williams v. Taylor, 216 Miss. 563, 62 So. 2d 883 (1953).

Although this section [Code 1942, § 372] should be construed liberally to effectuate its purposes, laborers and materialmen have no lien on the money owed by the owner to the contractor until they give the statutory stop notice to the owner. Chancellor v. Melvin, 211 Miss. 590, 52 So. 2d 360 (1951).

Laborers and materialmen, before completion of contract and payment of contract price, could protect claims by giving statutory notice. White's Lumber & Supply Co. v. Rea, 158 Miss. 695, 131 So. 259 (1930).

Rights of subcontractor, laborer, or materialman become effective only from date of notice to owner. Citizens' Lumber Co. v. Netterville, 137 Miss. 310, 102 So. 178 (1924).

Party seeking to hold owner for contractor's debt must give written notice of intention. McLendon v. Indianola Lumber Co., 128 Miss. 265, 90 So. 885 (1922).

10. —Sufficiency.

Subcontractor of subcontractor cannot give effective stop notice. Gammill Co. v. Guesnard, 167 Miss. 868, 150 So. 214 (1933).

Letter written by materialman to agent for owner before materials were furnished held wholly ineffective as statutory notice. United States Fid. & Guar. Co. v. Parsons, 154 Miss. 587, 122 So. 544 (1929).

11. Rights in fund; distribution.

That a materialman did not resort to the protection of this section [Code 1942, § 372] because he expected his bill to be paid when due does not give him any right as against a bank to which his contractor assigned an "earned estimate" which embraced the value of the materials. Nicholas v. Deposit Guar. Bank & Trust Co., 248 Miss. 580, 159 So. 2d 187 (1964).

When a subcontractor fails to pay a sub-subcontractor, the primary contractor, upon notice of such failure, is not required to hold funds belonging to the subcontractor until the sub-subcontractor is paid. Redd v. L & A Contracting Co., 246 Miss. 548, 151 So. 2d 205 (1963).

The purpose of this section [Code 1942, § 372] in amending former enactment (Code 1906, § 3074), was to confer equal rights as regards mechanic's and materialmen's liens, on all persons in the same class, regardless of when, or whether, such persons had given the owner written notice, provided the owner yet had in his hands funds owing to the contractor when such claimants gave notice, or if notice was not given, when the claim or claims were asserted in court, or, in other words, one notice stops the right of the owner to pay the contractor the amount claimed in that notice. McNair v. M.L. Virden Lumber Co., 193 Miss. 232, 4 So. 2d 684 (1941).

If after one claimant has given notice of claim for a mechanic's or materialman's lien, other claimants in the same class give notice to the owner of their claims, or if they do not give the notice, but assert their claims in court, to which the owner is a party, all before the owner has paid out the funds which he had when the first notice was received, then all such persons share ratably in those funds. McNair v. M.L. Virden Lumber Co., 193 Miss. 232, 4 So. 2d 684 (1941).

Code 1906, § 3072 (Code 1942, § 370), making all liens on the same building concurrent and payable in proportion out of the proceeds of the property when sold, applies only to liens for materials furnished to the owner or labor rendered under a contract with the owner, and does not apply to subcontractors, laborers, and materialmen, under the provisions of this section (Code 1906, § 3074 [Code 1942, § 372]). Enochs Lumber & Mfg. Co. v. Garber, 116 Miss. 229, 76 So. 730 (1917).

Materialmen seeking to enforce lien upon amounts paid into court by owner as still due principal contractor may show that assignee of principal contractor was in partnership with him, as such fact would subordinate assignee to all other claims for material and labor. Jake Strickland Lumber Co. v. Rheinhart, 115 Miss. 749, 76 So. 643 (1917).

Rights arising to materialmen and laborers for material furnished and labor rendered to contractor have only the effect of garnishment, and the one first serving notice has rights prior to those serving subsequent notices. Herrin v. Warren & Mobley, 61 Miss. 509 (1883).

When a written notice of a claim to a fund by laborers has been served subsequent to a writ of garnishment, the garnishment, being first in time is first in right. Herrin v. Warren & Mobley, 61 Miss. 509 (1883).

12. Release of fund.

Where contractor gives bond, funds due contractor are released from equity or trust in favor of materialmen and laborers. Dickson v. United States Fid. & Guar. Co., 150 Miss. 864, 117 So. 245 (1928).

No agreement between the owner and the building contractor, to which one who had furnished materials used in the erection of the building was not a party, can operate to release the owner from demand of the materialman, notice whereof in writing had been given him under this section [Code 1942, § 372] while he was still indebted to the contractor in a sum sufficient to pay the same. Rosenbaum v. Carlisle, 78 Miss. 882, 29 So. 517 (1901).

13. Suits to enforce lien.

Where a chancery court denies materialmen the right to intervene in a suit to recover contract price for erection of storage bins, the supreme court will affirm the decree on the ground that it was impossible to grant effective relief, where the materialmen appealed from the decree without supersedeas and did not appeal from the final decree in the main suit and where the owner paid a judgment to the beneficiaries under a decree in the main suit. Orgill Bros. & Co. v. Roddy, 227 Miss. 291, 86 So. 2d 37 (1956).

Suit may be brought within one year from date of last delivery of material, and indulgence by creditor will not extend time. Inerarity v. A.S. Wade & Co., 141 Miss. 552, 106 So. 828 (1926).

Lien is barred where suit was not brought until more than one year after default in monthly instalments for material. Inerarity v. A.S. Wade & Co., 141 Miss. 552, 106 So. 828 (1926).

ATTORNEY GENERAL OPINIONS

A subcontractor, laborer or materialman may not file a stop notice under this section to bind funds in the hands of a county owing the principal contractor on the construction or renovation of a county jail or other public building. Chamberlin, Dec. 5, 2002, A.G. Op. #02-0703.

RESEARCH REFERENCES

ALR. Sufficiency of designation of owner in notice, claim or statement of mechanic's lien. 48 A.L.R.3d 153.

Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 A.L.R.3d 475.

Effect of bankruptcy of principal contractor upon mechanic's lien of a subcontractor, laborer, or materialman as against owner of property. 69 A.L.R.3d 1342.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct. 69 A.L.R.4th 974.

Attorney's retaining lien: what items of client's property or funds are not subject to lien. 70 A.L.R.4th 827.

Construction and effect of statutes requiring construction fundholder to withhold payments upon "stop notice" from subcontractor, materialman, or other person entitled to funds. 4 A.L.R.5th 772.

Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "foreseeability" or "modern" rule. 75 A.L.R.5th 413.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 241-243.

CJS. 56 C.J.S., Mechanics' Liens §§ 107 et seq.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-183. Assignments by contractor prohibited.

No contractor or master workman except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors, journeymen, laborers, and materialmen as declared hereinbefore and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the subcontractors, journeymen, laborers and materialmen, as well as the owner. Provided, however, that this section shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond conditioned as provided for in the following section.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434a; 1930, § 2275; 1942, § 373; Laws, 1918, ch. 128.

Cross References — Liens on assigned negotiable instruments, see § 75-13-1.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 373] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the 14th Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

Code 1942, §§ 372, 373, and 374 are interdependent and must be considered together as providing one plan of protection for certain persons furnishing materials or performing labor for the improvement of the property of another. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

A supplier of materials to a subcontractor had no right to acquire a lien under Code 1942, § 372, and was in no position to invoke Code 1942, § 373 to invalidate assignments made by the general contractor to a bank. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

One claiming the benefit of this section [Code 1942, § 373] must give written notice, which includes a claim to the statute's benefit, to the owner. Geo. H. Jett Drilling Co. v. Tibbits, 230 F. Supp. 58 (W.D. La. 1964), motion denied, 234 F. Supp. 583 (W.D. La. 1964).

Under this section [Code 1942, § 373] a contractor's assignment of the proceeds of the contract did not cut off the rights of laborers and materialmen, when the required bond was not given. Geo. H. Jett Drilling Co. v. Tibbits, 230 F. Supp. 58 (W.D. La. 1964), motion denied, 234 F. Supp. 583 (W.D. La. 1964).

The giving of a deed of trust to a creditor by one making all arrangements for, and overseeing, the construction of a dwelling for himself is not the assignment of a contract or the proceeds thereof, to the detriment of materialmen, in violation of this section [Code 1942, § 373]. Jones Supply Co. v. Ishee, 249 Miss. 515, 163 So. 2d 470 (1964).

This section [Code 1942, § 373] does not extend to assignment by a subcontractor. Nicholas v. Deposit Guar. Bank & Trust Co., 248 Miss. 580, 159 So. 2d 187 (1964).

This section [Code 1942, § 373] applies to an assignment by a building contractor, for the purpose of obtaining construction funds, of a deed of trust given to him by the property owner to cover construction costs. Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

Where a purchaser obtained an option on an acre of land from the landowner, and entered into a contract with a contractor to construct a residence thereon, and the contractor applied to the bank for a loan offering the purchaser's FHA commitment as security and later made another application to the bank for a loan of a specified amount, whereupon the landowner executed to the contractor a warranty deed to the land in question, but required a contract specifying that the contractor would convey the lot to the purchaser upon the completion of the house and upon the payment of $1,500, and thereupon the contractor furnished the deed of trust to the bank, the deed of trust was void as to materialmen and a laborer, as well as to the purchaser, the equitable owner, and the bank was only entitled to a priority of $1,500, which was paid by the contractor to the landowner for the lot in question from the funds advanced by the bank. Lee Whsle. Co. v. McCoy, 232 Miss. 685, 100 So. 2d 121 (1958).

By virtue of this section [Code 1942, § 373] an assignment or transfer of contract by a contractor or master workman is subordinate to the rights of the subcontractors, journeymen, laborers, and materialmen, as well as the owner, unless performance bond is given as required by Code 1942, § 374. Lawson v. Traxler Gravel Co., 229 Miss. 159, 90 So. 2d 204 (1956).

This section [Code 1942, § 373] and companion sections providing for lien in favor of subcontractors, laborers, and materialmen, are applicable to the construction of an interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

Agreement between private corporation, holding contract with county for construction of bridge, and individual subletting such contract was a private contract, and, therefore, governed by this section [Code 1942, § 373]. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

On subcontractor's execution of bond, statutory restrictions on subcontractor's rights to assign proceeds of bridge repair subcontract were removed. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

Liability of subcontractor's sureties held not affected by subcontractor's assignment of funds due under contract. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

County bridge contractor, on subcontractor's default, after accepting subcontractor's assignment of proceeds of contract, held remanded to rights against subcontractor and his sureties to reimburse itself for amount it paid out in exoneration of its surety under original contract. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

RESEARCH REFERENCES

ALR. Validity of anti-assignment clause in contract. 37 A.L.R.2d 1251.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 279 et seq.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-185. Bond; provisions; right to intervene in action on bond.

When any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material or rental or lease equipment under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material or rental or lease equipment under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond, and any such person who has furnished labor or materials or rental or lease equipment used therein; for which payment has not been made, shall have the right to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee. The bond herein provided for may be made by any surety company authorized to do business in the State of Mississippi.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434b; 1930, § 2276; 1942, § 374; Laws, 1918, ch. 128; Laws, 2010, ch. 372, § 4, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment thrice inserted "or rental or lease equipment."

Cross References — Bonds securing public construction contracts and suits thereon, see §§ 31-5-51 et seq.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application generally.
3. Persons protected.
4. Bond provisions.
5. Liability on bond.
6. Waiver.
7. Suit on bond.

1. Validity.

This section [Code 1942, § 374] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

Liberty of contract held not abridged by this section [Code 1942, § 374]. United States Fid. & Guar. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88 (1927).

2. Construction and application generally.

Claimant under contractor's bond is not entitled to attorney's fees, notwithstanding that claimant might be entitled to such fees under Mississippi Code § 11-53-81 in action on open account against defaulting contractor, since claimant on contract surety bond is not entitled to recover attorney's fees unless statute or contract with surety so requires, and in instant case surety's bond does not require payment of attorney's fees and no such payment is required by § 85-7-185, which governs instant bond pertaining to contract between private parties. Kimberly-Clark Corp. v. Alpha Bldg. Co., 591 F. Supp. 198 (N.D. Miss. 1984).

Code 1942, §§ 372, 373, and 374 are interdependent and must be considered together as providing one plan of protection for certain persons furnishing materials or performing labor for the improvement of the property of another. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201 (N.D. Miss. 1968).

By virtue of Code 1942, § 373, an assignment or transfer of contract by a contractor or master workman is subordinate to the rights of the subcontractors, journeymen, laborers, and materialmen, as well as the owner, unless performance bond is given as required by this section [Code 1942, § 374]. Ladner v. Hogue Lumber & Supply Co., 229 Miss. 505, 91 So. 2d 545 (1956).

Where a realty company obtained a contract for the erection of defense housing units and the contract was sublet to a contractor who executed a bond to realty company conditioned on faithful performance of contractor's obligation to supply labor, supervision, tools and equipment for performance of the contract, fuel and repairs were necessary complement supplied by service station operators to contractor's vehicles and were within the full contemplation of both the contractor and its surety and were therefore covered by the bond. Seaboard Sur. Co. v. Bosarge, 226 Miss. 482, 84 So. 2d 517 (1956).

In an action against the surety on a contractor's bond executed pursuant to a contract with a political subdivision, rent and freight on a dragline and light plant used by the contractor in dredging and improving a ditch and canal are not to be construed as labor and materials furnished in the work of construction. Watts v. Western Cas. & Sur. Co., 210 Miss. 211, 49 So. 2d 255 (1950).

There is nothing in this section [Code 1942, § 374] that indicates an intention to require a retroactive or retrospective bond. United States Fid. & Guar. Co. v. Maryland Cas. Co., 191 Miss. 103, 199 So. 278 (1940).

Materialmen's suit against principal road contractor and surety on subcontractor's bond running to principal contractor held governed by statutes regarding suits on bonds to pay for labor and materials furnished, and not by statute requiring notice of suit by publication. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

This section [Code 1942, § 374] and companion sections providing for lien in favor of subcontractors, laborers, and materialmen, are applicable to the construction of an interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

County bridge contractor had privilege of determining whether subcontractor should furnish bond. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

Rights and obligations of parties to county bridge subcontract being a private contract between a corporate contractor and an individual were governed by the provisions of this section [Code 1942,

§ 374]. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

Where contractor gives bond, funds due contractor from owner are released from equity or trust in favor of materialmen and laborers. Dickson v. United States Fid. & Guar. Co., 150 Miss. 864, 117 So. 245 (1928).

3. Persons protected.

Lessors of equipment are not within the coverage provided by the statute, even where the contractor has agreed to furnish "all labor, material and equipment, service and supplies necessary to complete the job and to furnish a suitable performance bond." Great Am. Ins. Co. v. Busby, 247 Miss. 39, 150 So. 2d 131 (1963).

Where a subcontractor of a part of a contract with the federal government sublet its contract to another, the assignee executing a bond for the payment of all debts incurred for labor and materials, and thereafter reletting a part of its contract back to its assignor, the assignor became the subcontractor of the assignee, under the statute. United States Fid. & Guar. Co. v. Maryland Cas. Co., 191 Miss. 103, 199 So. 278 (1940).

Labor and materials furnished to a subcontractor are not covered by this section [Code 1942, § 374]. United States Fid. & Guar. Co. v. Maryland Cas. Co., 191 Miss. 103, 199 So. 278 (1940).

County bridge contractor, on subcontractor's default, after accepting subcontractor's assignment of proceeds of contract, held remanded to rights against subcontractor and his sureties to reimburse itself for amount it paid out in exoneration of its surety under original contract. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

Bond of contractor for private building held not to protect remote materialmen. Alabama Marble Co. v. United States Fid. & Guar. Co., 146 Miss. 414, 111 So. 573 (1927).

4. Bond provisions.

Only payment for labor and materials are covered by a private contract performance bond and no recovery can be had thereunder for equipment rental and transportation; however, recovery possible as to gas, oil, and ordinary repairs. Western Cas. & Sur. Co. v. Stribling Bros. Mach. Co., 244 Miss. 12, 139 So. 2d 838 (1962).

Under this section [Code 1942, § 374] the parties may insert in a bond for faithful performance such provisions and penalties as they may desire, but, at all events, it covers labor and material whether written or not. Seaboard Sur. Co. v. Bosarge, 226 Miss. 482, 84 So. 2d 517 (1956).

There is no statutory provision requiring a bond to contain a provision for the payment of insurance premiums where the contractor is required to carry liability insurance. Hartford Accident & Indem. Co. v. Hewes, 190 Miss. 225, 199 So. 93 (1940), modified, 190 Miss. 241, 199 So. 772 (1941).

Necessary repairs to contractor's equipment and purchase of new tools and machinery necessary to enable doing of work in constructing gas pipe line held within contractor's bond providing for payment of labor, materials, and "equipment," though some machinery would outlive construction of pipe line, it not appearing that machinery purchased was unnecessarily expensive and long lived. Linde Air Prods. Co. v. American Sur. Co., 168 Miss. 877, 152 So. 292 (1934).

Statute held not to prohibit contractor's bond from providing for payment for equipment in addition to supplies and materials going into construction of work and consumed therein. Linde Air Prods. Co. v. American Sur. Co., 168 Miss. 877, 152 So. 292 (1934).

Obligation of contractor's bond, conditioned on payment to persons performing labor or furnishing equipment, supplies, and materials, held not limited to supplies and materials which would, in absence of bond, be within lien, and obligation was determinable by conditions of bond itself. Linde Air Prods. Co. v. American Sur. Co., 168 Miss. 877, 152 So. 292 (1934).

Statute requiring provision in contractor's bond for payment of laborers and materialmen has effect of writing such conditions into bond, and contrary stipulations are ineffective. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931), error overruled, 161 Miss. 222, 135 So. 497 (1931), appeal dismissed, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), motion denied, 52 S. Ct. 456, 76 L. Ed. 1301 (1932).

Stipulations may be written into contractor's bond affecting liability of surety company and contractor to owner or builder; surety on contractor's bond providing for payments to contractor from owner was relieved from obligation to pay owner to the extent notes taken by contractor without surety's consent interfered with contract stipulation. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931), error overruled, 161 Miss. 222, 135 So. 497 (1931), appeal dismissed, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), motion denied, 52 S. Ct. 456, 76 L. Ed. 1301 (1932).

5. Liability on bond.

Where parties simultaneously execute payment bond bearing penal sum in amount equal to or greater than that of separately executed performance bond, payment bond supplants "additional obligations" imposed by § 85-7-185. McQueen Contracting, Inc. v. Fidelity & Deposit Co., 863 F.2d 1216 (5th Cir. 1989), opinion vacated in part on reh'g, 871 F.2d 32 (5th Cir. 1989).

A contractor's surety was entitled to indemnity from an architect in connection with improper roof construction where the architect failed to competently inspect the workmanship on the roof. U.R.S. Co. v. Gulfport-Biloxi Regional Airport Auth., 544 So. 2d 824 (Miss. 1989).

Surety on a subcontractor's performance bond, incorporating the terms of an indivisible contract to furnish all necessary materials and pay all labor necessary for the completion of specified work, was held liable for labor and materials furnished to the subcontractor prior to the execution of the bond, in the absence of showing of any prejudice to the surety by reason of such coverage. Reed v. Maryland Cas. Co., 244 F.2d 857 (5th Cir. 1957).

Where a contractor under a construction contract with the federal government sublet a portion of the contract to a subcontractor, which, after performing a part of its contract, assigned it to another, and the assignee executed a bond by which it assumed the obligation which the principal contractor was bound to complete by his original contract with the government, the doctrine of "expressio unius" was applicable and the assignee, which would be treated under the statute as a principal contractor, and its surety assumed only a prospective obligation, and so did not assume the payment of debts which had accrued against its assignor or against the principal contractor. United States Fid. & Guar. Co. v. Maryland Cas. Co., 191 Miss. 103, 199 So. 278 (1940).

Liability of subcontractor's sureties held not affected by subcontractor's assignment of funds due under contract. Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 138 So. 802 (1932).

Court in concursus proceedings to adjust claims of materialmen and subcontractors under contractor's bond may not allow attorney's fees to materialmen and subcontractors for attorneys representing their separate interest. Hartford Accident & Indem. Co. v. Bunn, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932).

Materialmen and subcontractors are entitled to interest as against surety on contractor's bond from maturity of demand for material or labor. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931), error overruled, 161 Miss. 222, 135 So. 497 (1931), appeal dismissed, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), motion denied, 52 S. Ct. 456, 76 L. Ed. 1301 (1932).

Assignee of notes and lien given by owner to contractor could not recover on contractor's bond for value of notes taken where the bond provided for payment to contractor in cash or current funds. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931), error overruled, 161 Miss. 222, 135 So. 497 (1931), appeal dismissed, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), motion denied, 52 S. Ct. 456, 76 L. Ed. 1301 (1932).

6. Waiver.

Acceptance of note for money due for labor and materials furnished for building held not waiver of mechanic's lien. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 160 Miss. 504, 135 So. 349 (1931).

Right to assert mechanic's lien held to inure to assignee of note accepted by materialman for money due for materials furnished in construction of building. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 160 Miss. 504, 135 So. 349 (1931).

Materialman, having taken proceeding inconsistent with stipulations of building bond and accepted security for claim, held to have waived right to resort to bond, being relegated to security. Hartford Accident & Indem. Co. v. Natchez Inv. Co., 161 Miss. 198, 132 So. 535 (1931), error overruled, 161 Miss. 222, 135 So. 497 (1931), appeal dismissed, 285 U.S. 169, 52 S. Ct. 354, 76 L. Ed. 685 (1932), motion denied, 52 S. Ct. 456, 76 L. Ed. 1301 (1932).

7. Suit on bond.

This section was applicable to a subcontractor's action on a performance bond, even though the principal had contracted with plaintiff in his corporate capacity and had executed the performance bond in his individual capacity, where there emerged from the evidence and inferences the inescapable conclusion that the individual who signed the bond was the real actor, whether as an individual or by his family corporation. Beco, Inc. v. American Fid. Fire Ins. Co., 370 So. 2d 1343 (Miss. 1979).

In suit on contractor's bond, laborers and materialmen's rights were not measured by provisions of mechanics' lien statute. Continental Cas. Co. v. Crook, 157 Miss. 518, 128 So. 574, 72 A.L.R. 186 (1930).

In a suit on contractor's bond, materialmen's and laborers' accounts or claims filed as exhibits, not showing date of performing labor or furnishing material, held sufficient, where supported by proof labor and material were furnished under contract. Continental Cas. Co. v. Crook, 157 Miss. 518, 128 So. 574, 72 A.L.R. 186 (1930).

RESEARCH REFERENCES

ALR. Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment. 59 A.L.R.2d 885.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman. 75 A.L.R.3d 505.

State or local government's liability to subcontractors, laborers, or materialmen for failure to require general contractor to post bond. 54 A.L.R.5th 649.

Am Jur. 17 Am. Jur. 2d, Contractors' Bonds § 1.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-187. Bond; persons with right of action.

If only a performance bond has been provided in accordance with this chapter and if no suit shall be brought by the obligee within six (6) months from the date of the earlier of final completion or actual use or occupancy of the project for its intended purpose, then any person supplying labor or materials to the bond principal on the project shall have a right of action on said bond for his use and benefit against said bond principal and the sureties thereon and to prosecute same to final judgment and execution, subject to the rights and demands of the bond obligee.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434c; 1930, § 2277; 1942, § 375; Laws, 1918, ch. 128; Laws, 2005, ch. 461, § 1, eff from and after July 1, 2005.

Cross References — Remedy to enforce lien, see § 85-7-31.

How and when lien is enforced, see § 85-7-141.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 375] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

Materialmen's suit against principal road contractor and surety on subcontractor's bond running to principal contractor, held governed by statute regarding suits on bonds to pay for labor and materials. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

Statute held applicable to construction of interstate railroad. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

RESEARCH REFERENCES

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-189. Bond; suit on; commencement.

(1) Suit on a performance claim by an obligee on a bond given in accordance with this chapter shall be commenced as follows:

(a) If the obligee is the owner of the project being constructed, such obligee shall bring suit within one (1) year after the earlier of final completion or actual use or occupancy of the project for its intended purpose; or

(b) If the obligee is other than an owner of the project being constructed, such obligee shall bring suit within one (1) year after such obligee receives final payment with respect to the project.

(2) When suit is instituted on a claim for payment on a payment bond given in accordance with this chapter, it shall be commenced within one (1) year after the day on which the last of the labor was performed or material or rental or lease equipment was supplied by the person bringing the action and not later.

(3) Any suit on a bond given in accordance with this chapter shall be brought in the county in which the contract or some part thereof was performed or in the county in which service of process may be obtained upon either the principal or the surety on such bond.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434d; 1930, § 2278; 1942, § 376; Laws, 1918, ch. 128; Laws, 1994, ch. 626, § 5; Laws, 2005, ch. 461, § 2; Laws, 2010, ch. 372, § 5, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment inserted "or rental or lease equipment" in (2).

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 376] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

The statute's reference to owners as part of the category of "any such persons" means owners who have acted as laborers or materialmen, i.e., owners who have supplied materials or labor to the project. Cooper Indus., Inc. v. Tarmac Roofing Sys., 276 F.3d 704 (5th Cir. 2002).

This section was applicable in a federal action on a contract bond to which the Miller Act was inapplicable, there having been made applicable to the bond by the regulation requiring it no particular statute of limitations and the court having consequently looked to the state statute of limitations applicable to actions of a similar nature. United States ex rel. Mississippi Rd. Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262 (5th Cir. 1976), cert. denied, 434 U.S. 828, 98 S. Ct. 106, 54 L. Ed. 2d 86 (1977), overruled on other grounds, United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977).

Code 1942, § 376, which applies to contractor's performance bonds, has no application to a fidelity bond or fidelity insurance. Latham v. United States Fid. & Guar. Co., 267 So. 2d 895 (Miss. 1972).

The one-year statute of limitations provided for in this section [Code 1942, § 376] does not begin to run until there has been publication of notice of settlement or abandonment of the contract. Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490 (Miss. 1967).

The publication of notice required by this section [Code 1942, § 376] applies both where the obligee makes final settlement and where it has determined that the contract has been abandoned. Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490 (Miss. 1967).

The publication required by this section [Code 1942, § 376] cannot be waived by custom, nor, in the case of a private contract, is publication of notice contrary to public policy. Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490 (Miss. 1967).

There is no difference in the meaning of this section [Code 1942, § 376] and that of Code 1942, § 9016. Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490 (Miss. 1967).

Lessors of equipment are not within the coverage provided by the statute, even where the contractor has agreed to furnish "all labor, material and equipment, service and supplies necessary to complete the job and to furnish a suitable performance bond." Great Am. Ins. Co. v. Busby, 247 Miss. 39, 150 So. 2d 131 (1963).

Materialmen's suit agains principal road contractor and surety on subcontractor's bond running to principal contractor, held governed by statute regarding suits on bonds to pay for labor and materials. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

State statutes providing for lien in favor of subcontractors, laborers, and materialmen are applicable to construction of interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

In suit against contractor and surety, intervention based on materialman's claim may be allowed any time within one year after final settlement of contract. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 160 Miss. 504, 135 So. 349 (1931).

RESEARCH REFERENCES

ALR. Amount for which mechanic's lien may be obtained where contract has been terminated or abandoned by consent of parties or without fault on contractor's part. 51 A.L.R.2d 1009.

Validity of contractual time period, shorter than statute of limitations, for bringing action. 6 A.L.R.3d 1197.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-191. Bond; suit on; only one action permitted; intervention.

If only a performance bond is given in accordance with this chapter and if suit is instituted on said performance bond only one (1) action shall be brought for performance and payment claims and any person entitled to sue may upon application intervene and be made a party to said suit and such intervention must occur within the time limited for such person to bring an original action; provided, however, if a separate payment bond is given then only one (1) separate action for payment claims shall likewise be brought on the payment bond and intervention shall be allowed in accordance with this statute.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434e; 1930, § 2279; 1942, § 377; Laws, 1918, ch. 128; Laws, 2005, ch. 461, § 3, eff from and after July 1, 2005.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

Provision of private work bond statute (§ 85-7-191) establishing that only one cause of action is permitted against surety's bond is inapplicable to party who has not been given constitutionally adequate notice of suit. American Fid. Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292 (Miss. 1985).

This section [Code 1942, § 377] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

One-action-only rule is affirmative defense which may be asserted by party wishing to take advantage of it; when defense is sustained, it is because defense in nature of plea in bar is held good, not because court lacks subject matter jurisdiction over second suit. American Fid. Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292 (Miss. 1985).

Materialmen's suit against principal road contractor and surety on subcontractor's bond held dismissible where former suit had been filed in another county on same bond against same surety by materialmen furnishing materials to subcontractor on same subcontract. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

This section [Code 1942, § 377] and companion sections providing for lien in favor of subcontractors, laborers, and materialmen, are applicable to the construction of an interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

In suit against contractor and surety permitting intervention and filing of answer and cross-bill after cause had been submitted on merits was proper, in absence of prejudice. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 160 Miss. 504, 135 So. 349 (1931).

In suit against contractor and surety, intervention based on materialman's claim may be allowed any time within one year after final settlement of contract. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 160 Miss. 504, 135 So. 349 (1931).

§ 85-7-193. Bond: judgment; pro rata recovery where funds insufficient.

If only a performance bond is given in accordance with this chapter and the recovery on the performance bond should be inadequate to pay the full amount found due including amounts due the obligee, judgment shall be given after the performance bond obligee is fully satisfied for all its claims, demands, rights and damages to each person, including reasonable attorney's fees in an amount to be set by the judge, pro rata of the amount of the recovery. The surety on said performance bond may pay into court for distribution the full amount of its liability, less any amount which may have been paid to the performance bond obligee by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434f; 1930, § 2280; 1942, § 378; Laws, 1918, ch. 128; Laws, 1987, ch. 392, § 3; Laws, 2005, ch. 461, § 4, eff from and after July 1, 2005.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 378] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

This section did not allow an award of attorneys fees where the bond was sufficient to cover the full amount of judgment. Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954 (Miss. 1999).

This section [Code 1942, § 378] and companion sections providing for lien in favor of subcontractors, laborers, and materialmen, are applicable to the construction of an interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

RESEARCH REFERENCES

ALR. Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 A.L.R.3d 475.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct. 69 A.L.R.4th 974.

Attorney's retaining lien: what items of client's property or funds are not subject to lien. 70 A.L.R.4th 827.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-195. Process.

To all suits instituted under the provisions of this chapter the parties interested shall be summoned as provided by Section 85-7-145; provided further that where any contractors' bond has been executed and delivered under any of the foregoing sections of this chapter and the contractor or principal obligor in said bond, or any one or more of said principal obligors therein shall be a non-resident or shall remove from the state, or so conceal himself therein that service of process cannot be directly made upon him personally, then in such case personal service of summons for said absent or absconding principal obligor may be made upon the insurance commissioner of the State of Mississippi in like manner, with the same procedure thereabout, and with the same effect as process may be served on said commissioner in cases of a defendant foreign insurance company; and the delivery of any such bond within this state shall be deemed equivalent to the appointment, by the principal obligors and by the surety or sureties therein, of the state insurance commissioner or his successors in office to be the true and lawful attorney of said obligors upon whom may be served all lawful process in any action or proceeding arising under said bond when for any one of the reasons aforesaid the said principal obligors or any one of them cannot be otherwise served with personal summons in this state, and the delivery of any bond in this chapter mentioned shall be a signification of the agreement and power of attorney of the said principal obligor or obligors and of said sureties that any such process against said principal or principals which is so served shall be of the same legal force and validity as if served upon the said principal or principals personally.

SOURCES: Codes, Hemingway's 1921 Supp. § 2434g; 1930, § 2281; 1942, § 379; Laws, 1918, ch. 128.

Cross References — Legal process served upon commissioner as attorney for foreign insurance company, see § 83-5-11.

Commissioner of insurance acting as agent for process on foreign insurance company, see § 83-21-1.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application.

1. Validity.

This section [Code 1942, § 379] and companion provisions do not, as applied to a bond which expresses an intention to exclude materialmen and laborers, constitute an arbitrary interference with liberty of contract, with resulting violation of the Fourteenth Amendment. Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co., 291 U.S. 352, 54 S. Ct. 392, 78 L. Ed. 840 (1934).

2. Construction and application.

Materialmen's suit against principal road contractor and surety on subcontractor's bond running to principal contractor held governed by statutes regarding suits on bonds to pay for labor and materials furnished, and not by statute requiring notice of suit by publication. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

Materialmen's suit against principal road contractor and surety on subcontractor's bond, held dismissible where former suit filed in another county of same bond, against same surety by materialmen furnishing materials to subcontractor on same subcontract. United States Fid. & Guar. Co. v. Dedeaux, 168 Miss. 794, 152 So. 274 (1934).

This section [Code 1942, § 379] and companion sections providing for lien in favor of subcontractors, laborers, and materialmen, are applicable to the construction of an interstate railroad, and were not suspended by federal law. Gulf States Creosoting Co. v. Southern Fin. & Constr. Corp., 166 Miss. 714, 146 So. 860 (1933).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens § 368.

CJS. 56 C.J.S., Mechanics' Liens § 335.

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-197. Claim may be recorded in lis pendens record.

Any laborer, materialman or architect entitled, or who may become entitled, to a lien under this chapter, or to give hereunder a stop notice to any owner, shall have the right to record his claim in the lis pendens record upon compliance with the following requirements, to wit: (1) He shall reduce his claim for the lien to writing which writing shall show the basis of his claim and all of the parties thereto or to be affected by the lien, and such writing shall contain a description of the property sought to be bound, and it shall also set forth the rights claimed in the property to be bound, and the person claiming the lien shall make an affidavit to the writing. (2) He shall notify the owner in person or by certified mail, return receipt requested, and he shall attach to the original of the said notice an affidavit that the said notice has been given and the date and manner thereof. Thereupon said notice may be delivered to the clerk of the chancery court, who shall record the claim in the lis pendens record; and if in due form it shall be notice both of the lien and to the owner and all other persons interested, all of whom shall thereupon be bound thereby. Provided, however, that the aggregate amount of all the claims herein provided for shall not be a lien upon or bind the property for a greater amount than the original contract price or the amount of the owner's liability thereunder at the time the notice is filed, and in event said lien shall exceed the sum of the contract price or the balance due thereunder then they shall be paid pro rata; and, provided further, that no notice hereunder shall operate to extend the time during which the party entitled may bring an action on the claim or to enforce the right with reference to which his claim is filed, and when such rights shall cease, the notice hereunder given shall be without effect.

SOURCES: Codes, 1930, § 2282; 1942, § 380; Laws, 1928, ch. 136; Laws, 1984, ch. 319, eff from and after July 1, 1984.

Cross References — Lis pendens notice of suit affecting real property, see §§ 11-47-3 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by the purchaser of a house for damages against the builder, the trial court erred in sustaining the builder's demurrer to one count of the complaint charging it with falsely filing a materialmen's lien in 1977 against the property without providing notice to the purchaser as required by § 85-7-197 where the claim was not barred by the one-year statute of limitations set out in § 85-7-201 because the suit had been filed in 1979 within a month after the purchaser first became aware of the lien. The fact that the notice of lien was listed in the "Notice of Construction Liens" book Liens: book established by § 85-7-133, rather than on the lis pendens docket established by by § 85-7-197, did not excuse the builder from the notice requirement of the latter statute. Hicks v. Greenville Lumber Co., 387 So. 2d 94 (Miss. 1980), overruled on other grounds, Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983).

Knowledge that a house is newly built and that the owner is behind hand in his payments to claimant is not the equivalent of actual notice of the claim of a materialman. Jones Supply Co. v. Ishee, 249 Miss. 515, 163 So. 2d 470 (1964).

Materialmen could have protected their interest against the purchaser of a deed of trust by filing either the contracts under which their liens arose, or lis pendens notices in the office of the chancery clerk. Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 150 So. 2d 416 (1963).

RESEARCH REFERENCES

ALR. Amount for which mechanic's lien may be obtained where contract has been terminated or abandoned by consent of parties or without fault on contractor's part. 51 A.L.R.2d 1009.

Sale of real property as affecting time for filing notice of or perfecting mechanic's liens as against purchaser's interest. 76 A.L.R.2d 1163.

What constitutes "commencement of building or improvement" for purposes of determining accrual of mechanic's lien. 1 A.L.R.3d 822.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 184 et seq.

CJS. 57 C.J.S., Mechanics' Liens §§ 107 et seq.

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

§ 85-7-199. Discharge of lien to be noted of record.

When a lien is paid or extinguished the party executing a lis pendens notice shall enter satisfaction, or cause the same to be entered upon the lis pendens record, and all the provisions of law respecting the entry of satisfaction on the records of deeds of trust and mortgages shall apply herein.

SOURCES: Codes, 1930, § 2283; 1942, § 381; Laws, 1928, ch. 136.

Cross References — Termination of real property suit which had been entered on lis pendens record, see § 11-47-11.

Bar of remedy on mortgage when debt is barred, see § 15-1-21.

Termination of lien when it appears by record to be barred, see § 89-5-19.

Satisfaction of mortgage or deed of trust being entered on record, see § 89-5-21.

RESEARCH REFERENCES

ALR. Requiring security as condition of canceling of record mortgage or lien, or of recording payment. 2 A.L.R.2d 1064.

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens § 309.

60 Am. Jur. 2d, Payment §§ 62, 63.

17 Am. Jur. Pl & Pr Forms (Rev) Mechanics' Liens, Forms 81 et seq. (satisfaction, discharge, or extinction).

CJS. 56 C.J.S., Mechanics' Liens §§ 261-263 et seq.

§ 85-7-201. Penalty for false notice; action to expunge.

Any person who shall falsely and knowingly file the notice mentioned in Section 85-7-197 without just cause shall forfeit to every party injured thereby the full amount for which such claim was filed, to be recovered in an action by any party so injured at any time within one (1) year from such filing; and any person whose rights may be adversely affected may apply, upon two (2) days' notice, to the chancery court or to the chancellor in vacation, or to the county court, if within its jurisdiction, to expunge; whereupon proceedings with reference thereto shall be forthwith had, and should it be found that the claim was improperly filed rectification shall at once be made thereof.

SOURCES: Codes, 1930, § 2284; 1942, § 382; Laws, 1928, ch. 136.

JUDICIAL DECISIONS

1. In general.

Mississippi Code § 85-7-197, providing for statutory damages for filing of false construction lien, is penal in nature; one seeking to bring claim for filing of false construction lien must bring case clearly within statute's terms, and must clearly show that lien was filed "falsely, knowingly, and without just cause"; "knowing" violation consists of act done with evil or bad purpose; filing in good faith on advice of counsel in attempting to protect interests is not filing with bad or evil purpose since any other statutory construction would place claimant in position of being forced to choose between forfeiture of rights through nonfiling or lawsuit if such filing proves erroneous no matter how honestly and sincerely done. Manderson v. Ceco Corp., 587 F. Supp. 445 (N.D. Miss. 1984).

In an action by the purchaser of a house for damages against the builder, the trial court erred in sustaining the builder's demurrer to one count of the complaint charging it with falsely filing a materialmen's lien in 1977 against the property without providing notice to the purchaser as required by § 85-7-197 where the claim was not barred by the one-year statute of limitations set out in § 85-7-201 because the suit had been filed in 1979 within one month after the purchaser first became aware of the lien. The fact that the notice of lien was listed in the "Notice of Construction Liens" book established by § 85-7-133 rather than on the lis pendens docket established by by § 85-7-197, did not excuse the builder from the notice requirement of the latter statute. Hicks v. Greenville Lumber Co., 387 So. 2d 94 (Miss. 1980), overruled on other grounds, Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670 (Miss. 1983).

RESEARCH REFERENCES

Law Reviews. Dunn, Construction Contract Claims and Litigation-Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

LAUNDRY PLANT OPERATORS

SEC.	
85-7-221.	Definition.
85-7-223.	Sale of clothing, etc., for cleaning charges.
85-7-225.	Sale of clothing, etc., for storage charges permitted.
85-7-227.	Notice to owners.
85-7-229.	Sale; disposition of proceeds.
85-7-231.	Notices required to be posted; form and content of notices.
85-7-233.	Purposes and intent of Sections 85-7-221 through 85-7-233.
85-7-235.	Sale of clothing after 180 days without notice or liability to owner.

§ 85-7-221. Definition.

As used in Sections 85-7-221 through 85-7-233, the term "person" shall mean a natural person, partnership, corporation, or other legal entity.

SOURCES: Codes 1942, § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489, eff 30 days from and after passage (approved June 1, 1962).

§ 85-7-223. Sale of clothing, etc., for cleaning charges.

Any garment, clothing, wearing apparel or household goods, which have been repaired, altered, dyed, cleaned, pressed, glazed or laundered, remaining in the possession of a person for a period of ninety (90) days or more, may be sold to pay reasonable or agreed charges, together with any costs or expenses provided for in Sections 85-7-221 through 85-7-233. Except as otherwise provided in Section 85-7-235, the person to whom such charges are payable and owing shall first notify the owner or owners of the proposed sale of the articles belonging to them and the amount of the charges due thereon in the manner prescribed in Section 85-7-227.

SOURCES: Codes, 1942, § 382-01; Laws, 1946, ch. 468 §§ 1-8; Laws, 1962, ch. 489; Laws, 1992, ch. 315, § 1, eff from and after July 1, 1992.

Cross References — Sale of clothing left for more than 180 days, without notice or liability to owner, see § 85-7-135.

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Liens §§ 52, 53 et seq.

12 Am. Jur. Legal Forms 2d, Liens § 165:23 (notice of lien and of sale-launderer's or drycleaner's lien for service rendered).

§ 85-7-225. Sale of clothing, etc., for storage charges permitted.

All garments, clothing, wearing apparel, or household goods placed in storage, or on which any of the services or labors mentioned in Section 85-7-223 have been performed and then placed in storage, by agreement and remaining in the possession of a person without the reasonable or agreed charges having been paid for a period of ninety (90) days, may be sold to pay said charges, provided that the person has notified the owner or owners thereof of the sale as prescribed in Section 85-7-227. Persons operating as warehouses or warehousemen shall not be affected by this section.

SOURCES: Codes, 1942 § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489; Laws, 1992, ch. 315, § 2, eff from and after July 1, 1992.

Cross References — Sale of clothing left for more than 180 days, without notice or liability to owner, see § 85-7-135.

§ 85-7-227. Notice to owners.

The mailing by United States certified mail, return receipt requested, of a letter with a return address marked thereon, addressed to the owner or owners, at their last known address or the address given at the time of delivery of such articles to the person, shall constitute notice under the provisions of Sections 85-7-221 through 85-7-233. The letter shall state that the articles upon which the charges are owing will be disposed of unless they are redeemed within thirty (30) days of the mailing of the notice. Said notice shall be mailed at least thirty (30) days before the articles belonging to such owner or owners may be sold for charges due thereon. The cost of mailing said letter shall be added to the charges.

SOURCES: Codes, 1942, § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489; Laws, 1992, ch. 315, § 3, eff from and after July 1, 1992.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. Legal Forms 2d, Liens § 165:23 (notice of lien and of sale-launderer's or drycleaner's lien for service rendered).

§ 85-7-229. Sale; disposition of proceeds.

If the chattel or chattels are not redeemed within thirty (30) days after the mailing of such letter, the person may sell such articles on the day and at the time and place specified in such letter. Such sales may be made either at public auction or by private sale. The proceeds of the sale in excess of the charges and necessary expenses of the procedure required by Sections 85-7-221 through 85-7-233, shall be held by the person for a period of six (6) months, and if not reclaimed by the owner thereof within that time shall escheat to the county and be paid over to the chancery clerk to be covered into the general fund of the county in which the sale was held.

SOURCES: Codes, 1942, § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489, eff 30 days from and after passage (approved June 1, 1962).

§ 85-7-231. Notices required to be posted; form and content of notices.

All persons, taking advantage of Sections 85-7-221 through 85-7-233, must keep posted at all times in a prominent place in their receiving office or offices, two (2) notices of dimensions of not less than eight and one-half (8-½) by eleven (11) inches which read as follows: "Not responsible for goods left on hand for more than ninety (90) days. All articles cleaned, pressed, glazed, laundered, washed, altered, dyed or repaired, and not called for in ninety (90) days, will be sold to pay charges," and "All articles which are stored by agreement and upon which the charges are not paid for ninety (90) days will be sold to pay charges."

SOURCES: Codes, 1942, § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489; Laws, 1992, ch. 315, § 4, eff from and after July 1, 1992.

Cross References — Sale of clothing left for more than 180 days, without notice or liability to owner, see § 85-7-135.

§ 85-7-233. Purposes and intent of Sections 85-7-221 through 85-7-233.

The purpose and intent of Sections 85-7-221 through 85-7-233 is to provide an inexpensive means of enforcing liens for small amounts, and to that end the provisions of said sections shall be construed to create a lien in addition to, and shall not exclude, any liens which may exist by virtue of either the common law or any other statute of the State of Mississippi.

SOURCES: Codes, 1942, § 382-01; Laws, 1946, ch. 468, §§ 1-8; Laws, 1962, ch. 489, eff 30 days from and after passage (approved June 1, 1962).

§ 85-7-235. Sale of clothing after 180 days without notice or liability to owner.

If any person fails to claim any garment, clothing, wearing apparel, household goods or other article delivered to any laundry or dry cleaning establishment described in Sections 85-7-223 and 85-7-225 and displaying the notice described in Section 85-7-231, for a period of one hundred eighty (180) days, the laundry or dry cleaning establishment, without giving notice to the owner, may dispose of such garment, clothing, wearing apparel, household goods, or other article by whatever means it may choose, without liability or responsibility to the owner.

SOURCES: Laws, 1992, ch. 315, § 5, eff from and after July 1, 1992.

TOWING AND STORAGE OF MOTOR VEHICLES

Sec.
85-7-251. Sale of motor vehicle for towing and storage cost; notice requirement.

§ 85-7-251. Sale of motor vehicle for towing and storage cost; notice requirement.

(1) The owner of a motor vehicle that has been towed at his request or at the direction of a law enforcement officer, or towed upon request of a real property owner upon whose property a vehicle has been left without permission of the real property owner for more than five (5) days, shall be liable for the reasonable price of towing and storage of such vehicle; and the towing company to whom the price of such labor and storage costs may be due shall have the right to retain possession of such motor vehicle until the price is paid.

(2) Within twenty-four (24) hours, the towing company shall report to the local law enforcement agency having jurisdiction any vehicle that has been towed unless the vehicle was towed at the request of the owner of the vehicle. If the owner of a towed vehicle has not contacted the towing company within five (5) business days of the initial tow, the towing company shall obtain from the appropriate authority the names and addresses of any owner and lienholder. If the information from the appropriate authority fails to disclose the owner or lienholder, a good faith effort shall be made by the towing company to locate ownership, including a check for tag information, inspection sticker, or any papers in the vehicle that may indicate ownership. Upon location of the owner and lienholder, the towing company shall notify them by registered mail of the amount due for towing, postmarked no later than the tenth day following the initial tow. If such amount shall not be paid within thirty (30) days from the initial tow, the towing company to whom such charges are payable shall notify by certified mail any legal owner and holder of any lien, as disclosed by the motor vehicle title records or other investigation, of notice of sale of the property. If such property has not been redeemed within ten (10) days after the mailing of the certified letter, the towing company may commence sale of the property at public auction. The towing company shall publish for two (2) consecutive weeks a notice of sale in the newspaper having circulation in the county where the vehicle was initially towed. The proceeds of the sale of such property in excess of the amount needed to pay the towing, reasonable storage and necessary expenses of the procedures required by this section shall be held by the towing company for a period of six (6) months, and, if not reclaimed by the owner thereof within such time, shall become the property of the county and be paid to the chancery clerk of the county in which the sale was held to be deposited into the county general fund, subject, however, to any rights of the recorded lienholder.

(3) The failure to make a good faith effort to comply with the requirements of this section shall preclude the imposition of any storage charges or towing charges against the towed vehicle.

(4) Every towing company shall maintain accurate records for a period of three (3) years, which records shall identify the vehicles it has towed and stored and all procedures that it has taken to comply with the provisions of this chapter.

SOURCES: Laws, 1995, ch. 578, § 1, eff from and after July 1, 1995.

JUDICIAL DECISIONS

1. Construction with other law.

The mechanic's lien statute, Miss. Code Ann. § 85-7-107 (1999), limits recovery to the costs of labor and materials, unlike § 85-7-251, which governs liens available for towing and storing motor vehicles. Allstate Ins. Co. v. Green, 794 So. 2d 170 (Miss. 2001).

RESEARCH REFERENCES

Am Jur. 7A, Am. Jur. 2d, Automobiles and Highway Traffic § 284.

CJS. 36A C.J.S., Fines § 19.

GENERAL PROVISIONS

SEC.
85-7-261. How lien created.
85-7-263. Liens on the same building, etc. concurrent.
85-7-265. Proceedings under justice courts.

§ 85-7-261. How lien created.

Unless otherwise expressly provided, the liens created or mentioned in this chapter shall exist by virtue of the relation of the parties, and without any writing, or if in writing, without recording; and the rights and liens conferred may be asserted and enforced by the assigns and personal representatives of the lienor.

SOURCES: Codes, 1880, § 1361; 1892, § 2683; 1906, § 3043; Hemingway's 1917, § 2401; 1930, § 2273; 1942, § 371.

Cross References — Arbitration of controversies arising out of construction contracts and related agreements, and failure of arbitration to effect liens, see § 11-15-101.

Criminal offense of removing property subject to lien out of state, see § 97-17-77.

Criminal offense of selling property on which lien exists, see § 97-19-51.

RESEARCH REFERENCES

Am Jur. 51 Am. Jur. 2d, Liens §§ 9, 11, 12 et seq.

16 Am. Jur. Pl & Pr Forms (Rev), Liens, Forms 1 et seq. (creation and perfection of liens).

§ 85-7-263. Liens on the same building, etc. concurrent.

All liens for erecting, constructing, altering, or repairing the same building, house, structure, fixture, boat, water craft, railroad, or railroad embankment shall be concurrent, and shall be paid in proportion out of the proceeds of the property when sold; and in case the sheriff shall have doubts as to the proper application of the money, he may return the same to the court, stating the question, for its determination.

SOURCES: Codes, 1857, ch. 39, art. 14; 1871, § 1617; 1880, § 1392; 1892, § 2712; 1906, § 3072; Hemingway's 1917, § 2432; 1930, § 2272; 1942, § 370.

Cross References — Owelty being a lien, see § 11-21-33.

Lien created by party being binding on his share of partitioned property, see § 11-21-39.

JUDICIAL DECISIONS

1. In general.

This section [Code 1906, § 3072 (Code 1942, § 370)] applies only to liens for materials furnished to the owner or labor rendered under a contract with the owner, and does not apply to subcontractors, laborers, and materialmen, under the provisions of Code 1906, § 3074. (Code 1942, § 372). Enochs Lumber & Mfg. Co. v. Garber, 116 Miss. 229, 76 So. 730 (1917).

RESEARCH REFERENCES

Am Jur. 53 Am. Jur. 2d, Mechanics' Liens §§ 262 et seq.

§ 85-7-265. Proceedings under justice courts.

Justice courts shall have jurisdiction of cases arising under this chapter where the amount does not exceed the jurisdictional amount provided for in Section 9-11-9, Mississippi Code of 1972, and the proceedings shall be as nearly in accordance with the provisions of this chapter as may be practicable, and the parties shall have the right of appeal as in other cases. But the sale of buildings under their judgments may be advertised and made as sales of personal property levied on under execution issued by the justice court.

SOURCES: Codes, Hutchinson's 1848, ch. 45, art. 7 (3); 1857, ch. 39, art. 15; 1871, § 1618; 1880, § 1393; 1892, § 2713; 1906, § 3073; Hemingway's 1917, § 2433; 1930, § 2271; 1942, § 369; Laws, 1989, ch. 406, § 1, eff from and after July 1, 1989.

CHAPTER 8

Uniform Federal Lien Registration Act

SEC.
85-8-1. Short title.
85-8-3. Application; exception.
85-8-5. Notice of lien; filing.
85-8-7. Certification of notice of lien.
85-8-9. Filing notice; duties and responsibilities.
85-8-11. Duties of chancery clerk.
85-8-13. Fees.
85-8-15. Interpretation and construction of Chapter.

§ 85-8-1. Short title.

This chapter may be cited as the Uniform Federal Lien Registration Act.

SOURCES: Laws, 1989, ch. 515, § 1, eff from and after January 1, 1990.

Comparable Laws from other States — California: Cal Code Civ Proc § 2107 et seq.
Colorado: C.R.S. 38-25-101 et seq.
Illinois: 770 ILCS 110/1 et seq.
Maine: 33 M.R.S. § 1901 et seq.
Maryland: Md. REAL PROPERTY Code Ann. § 3-401 et seq. (2011)
Michigan: MCLS § 211.661 et seq. (2011).
Montana: Mont. Code Anno., § 71-3-201 et seq. (2010)
Nebraska: R.R.S. Neb. § 52-1001 et seq. (2010)
New Hampshire: RSA 454-B:7 (2011)
New Mexico: N.M. Stat. Ann. § 48-1-1 et seq. (2010)
Nevada: Nev. Rev. Stat. Ann. § 108.825 et seq.
North Dakota: N.D. Cent. Code, § 35-29-01 et seq. (2011).
Oklahoma: 68 Okl. St. § 3401 et seq. (2011)
Pennsylvania: 74 P.S. § 157-1 et seq.
Virginia: Va. Code Ann. § 55-142.1 et seq. (2011).
Washington: Rev. Code Wash. (ARCW) § 60.68.005 et seq.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-3. Application; exception.

This chapter applies only to federal tax liens and to other federal liens notices and to other federal liens notices of which under any Act of Congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens. This chapter shall not apply to security interests governed by the provisions of the Uniform Commercial Code-Secured Transactions.

SOURCES: Laws, 1989, ch. 515, § 2, eff from and after January 1, 1990.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-5. Notice of lien; filing.

(1) Notices of liens, certificates and other notices affecting federal tax liens or other federal liens must be filed in accordance with this chapter.

(2) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed in the office of the chancery clerk of the county in which the real property subject to a federal lien is situated.

(3) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates of notices affecting the liens shall be filed as follows:

(a) If the person against whose interest the lien applies is a corporation or a partnership whose principal executive office is in the state, as these entities are defined in the Internal Revenue laws of the United States, in the office of the Secretary of State.

(b) If the person against whose interest the lien applies is a trust that is not covered by paragraph (a) of this subsection, in the office of the Secretary of State.

(c) If the person against whose interest the lien applies is the estate of a decedent, in the office of the Secretary of State.

(d) In all other cases in the office of the chancery clerk of the county where the owner resides at the time of filing of the notice of lien.

SOURCES: Laws, 1989, ch. 515, § 3, eff from and after January 1, 1990.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-7. Certification of notice of lien.

Certification of notices of liens, certificates or other notices affecting federal liens by the Secretary of the Treasury of the United States or his delegate or by any official or entity of the United States responsible for filing or certify notice of any other lien, entitles them to be filed and no other attestation, certification or acknowledgment is necessary.

SOURCES: Laws, 1989, ch. 515, § 4, eff from and after January 1, 1990.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-9. Filing notice; duties and responsibilities.

(1) If a notice of federal lien, a refiling of a notice of federal lien, or a notice of revocation of any certificate described in subsection (2) of this section is presented to the filing officer who is:

(a) The Secretary of State, he shall cause the notice to be marked, held and indexed in accordance with the provisions of Section 75-9-519, Mississippi Code of 1972, of the Uniform Commercial Code as if the notice were a financing statement within the meaning of that code; or

(b) Chancery clerk, he shall endorse thereon his identification and the date and time of receipt and forthwith file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the title and address of the official party certifying the lien, and the total amount appearing on the notice of lien.

(2) If a certificate of release, nonattachment, discharge or subordination of any lien is presented to the Secretary of State for filing he shall:

(a) Cause a certificate of release or nonattachment to be marked, held and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, but the notice of lien to which the certificate relates may not be removed from the files; and

(b) Cause a certificate of discharge or subordination to be held, marked and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code.

(3) If a refiled notice of federal lien referred to in subsection (1) of this section or any of the certificates or notices referred to in subsection (2) of this section is presented for filing with the chancery clerk, he shall permanently attach the refiled notice or the certificate to the original notice of lien and enter the refiled notice of the certificate with the date of filing in any alphabetical lien index on the line where the original notice of lien is entered.

(4) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien, filed under this act, naming a particular person, and if a notice or certificate is on file, giving the date and hour of its filing. The fee for a certificate is Five Dollars ($5.00). Upon request the filing officer shall furnish a copy of any notice of federal lien or notice or certificate affecting a federal lien for a fee of Two Dollars ($2.00) per page.

SOURCES: Laws, 1989, ch. 515, § 5; Laws, 1990, ch. 373, § 1; Laws, 2001, ch. 495, § 31, eff from and after Jan. 1, 2002.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-11. Duties of chancery clerk.

Chancery clerks with whom notices of federal liens, certificates and notices affecting such liens have been filed prior to January 1, 1990, shall, after that date, continue to maintain records containing such notices and certificates filed prior to January 1, 1990.

SOURCES: Laws, 1989, ch. 515, § 6; Laws, 1990, ch. 373, § 2, eff from and after passage (approved March 13, 1990).

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-13. Fees.

(1) The fee for filing and indexing each notice of lien or certificate or notice affecting the lien in the Office of the Secretary of State is:

(a) For a lien on real estate	$ 5.00
(b) For a lien on personal property	$ 5.00
(c) For a certificate of discharge or subordination	$ 5.00
(d) For all other notices, including a certificate of release or nonattachment	$ 5.00

(2) The fee for filing and indexing each notice of lien or certificate or notice affecting the lien in the office of the chancery clerk is:

(a) For a lien on real estate	$ 10.00
(b) For a lien on personal property	$ 10.00
(c) For a certificate of discharge or subordination	$ 10.00
(d) For all other notices, including a certificate of release or nonattachment	$ 10.00

(3) The appropriate officer shall bill the district directors of Internal Revenue or other appropriate federal officials on a monthly basis for fees for documents filed by them.

SOURCES: Laws, 1989, ch. 515, § 7; Laws, 2007, ch. 333, § 1, eff July 1, 2007.

Editor's Note — On June 15, 2007, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965 to the amendment of this Section by Laws of 2007, ch. 333, § 1.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

§ 85-8-15. Interpretation and construction of Chapter.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SOURCES: Laws, 1989, ch. 515, § 8, eff from and after January 1, 1990.

RESEARCH REFERENCES

Am Jur. 34 Am. Jur. 2d, Federal Taxation (1989) ¶ 9473.

CHAPTER 9

Debt Adjusting or Credit Arranging [Repealed]

§§ 85-9-1 through 85-9-5. Repealed.

Repealed by Laws, 2003, ch. 465, § 17, eff from and after July 1, 2003.

§ 85-9-1. [Codes, 1942, § 306-01; Laws, 1971, ch. 302, § 1, eff from and after July 1, 1971.]

§ 85-9-3. [Codes, 1942, § 306-02; Laws, 1971, ch. 302, § 2, eff from and after July 1, 1971.]

§ 85-9-5. [Codes, 1942, § 306-03; Laws, 1971, ch. 302, § 3; Laws, 1989, ch. 450, § 1; Laws, 1991, ch. 507, § 1, eff from and after passage (approved April 5, 1991).]

Editor's Note — Former § 85-9-1 was entitled: "Definitions."
Former § 85-9-3 was entitled: "Debt adjusting unlawful; penalties."
Former § 85-9-5 was entitled: "Exclusions."

TITLE 87

CONTRACTS AND CONTRACTUAL RELATIONS

Chapter 1. Gambling and Future Contracts 87-1-1
Chapter 3. Power and Letters of Attorney 87-3-1
Chapter 5. Principal and Surety 87-5-1
Chapter 7. Improvements to Real Property 87-7-1
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CHAPTER 1

Gambling and Future Contracts

Sec.
87-1-1. Utterly void.
87-1-3. Transfer of property to secure or pay, inures to wife and children of loser.
87-1-5. Loser may sue and recover money or property lost; exceptions.
87-1-7. Limitation on application of Sections 87-1-1 through 87-1-5.
87-1-9. Future contracts; definitions.
87-1-11. Certain exchanges authorized.
87-1-13. Who may provide market quotations by wire.
87-1-15. When contracts of sale for future delivery of cotton, grain, stock, or other commodities enforceable.
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87-1-29. Principal entitled to certain written information.
87-1-31. Prohibition against buying or selling futures.
87-1-33. Penalty for dealing in futures.

§ 87-1-1. Utterly void.

Contracts, judgments, securities, conveyances made, given, granted, or executed, where the whole or any part of the consideration or foundation thereof shall be for money, or any valuable thing won, lost, or bet at any game or games, or on any horse-race, cock-fight, or at any other sport, amusement, or pastime, or on any wager whatever, or for the reimbursing or repaying any money knowingly lent or advanced for the purpose of such gaming or gambling, or to be wagered on any game, play, horse-race, cock-fight, or on any sport, amusement, pastime, or wager, shall be utterly void.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3 (1); 1857, ch. 45, art. 1; 1871, § 1900; 1880, § 990; 1892, § 2114; 1906, § 2300; Hemingway's 1917, § 1910; 1930, § 1824; 1942, § 22.

Cross References — Mississippi Gaming Control Act, see § 75-76-1 et seq.

Inapplicability of this section to Mississippi Gaming Control Act, see § 87-1-7.
Clubs, boats, and the like operating gaming devices as nuisances, see § 95-3-25.
Criminal gambling and wagers generally, see §§ 97-33-1 et seq.
Special duty of officers to arrest gamblers, see § 99-3-25.
Proof in gambling cases, see § 99-17-25.

JUDICIAL DECISIONS

1. Construction and application.
2. Check in payment.
3. Advancement of money for gambling business.
4. Judgment on gambling contract.
5. Note or bill of exchange for gambling consideration.
6. Recovery of money paid.

1. Construction and application.

Section 87-1-1, which declares "utterly void" all contracts executed and made in connection with illegal gaming activities, does not bar collection of debts arising out of legal gaming activities; thus, § 87-1-1 does not apply to bingo, since charitable bingo games were exempted from any and all "illegal" definitions by § 97-33-51. Frank v. Dore, 635 So. 2d 1369 (Miss. 1994).

Agreement that price of cotton actually delivered should be fixed by New York cotton quotations during specified time was not illegal. Burgson & Co. v. Williams, Smithwick & Co., 155 Miss. 351, 121 So. 817 (1929).

The trustee in a deed of trust or assignment may enjoin a levy on the property conveyed to him, on the ground that the note on which the judgment is based was given for a gambling consideration. Smither v. Keys, 30 Miss. 179 (1855).

Where the original contract is illegal, any subsequent contract which carries it into effect is also illegal. Adams v. Rowan, 16 Miss. (8 S. & M.) 624 (1847).

2. Check in payment.

Indorsement and transfer of check in payment of gambling debt is void and ineffective to pass title to any subsequent holder. Skinner Mfg. Co. v. Deposit Guar. Bank, 160 Miss. 815, 133 So. 660 (1931).

Bank paying check indorsed in payment of gambling debt, resulting in loss to bank when maker stopped payment, held without remedy against maker. Skinner Mfg. Co. v. Deposit Guar. Bank, 160 Miss. 815, 133 So. 660 (1931).

3. Advancement of money for gambling business.

One who advances money to another to be used in a gambling business, and who is to be repaid only from the proceeds of the business, cannot enforce payment, and a note given after the close of business for money so advanced is without valid consideration. Virden v. Murphey, 78 Miss. 515, 28 So. 851 (1900).

4. Judgment on gambling contract.

A suit on a judgment rendered upon a note given for gambling contract can be defeated by showing the illegality of the original transaction. Campbell v. New Orleans Nat'l Bank, 74 Miss. 526, 21 So. 400 (1897), on suggestion of error, 74 Miss. 530, 23 So. 25 (1897).

A judgment obtained upon a gambling contract is void by statute, and it will make no difference that the note on which the judgment is based passed for value into the hands of an innocent purchaser. Lucas v. Waul, 20 Miss. (12 S. & M.) 157 (1849); Martin v. Terrell, 20 Miss. (12 S. & M.) 571 (1849); Smither v. Keys, 30 Miss. 179 (1855).

5. Note or bill of exchange for gambling consideration.

One who advances money to another to be used in a gambling business, and who is to be repaid only from the proceeds of the business, cannot enforce payment, and a note given after the close of business for money so advanced is without valid consideration. Virden v. Murphey, 78 Miss. 515, 28 So. 851 (1900).

A bill of exchange or promissory note is void where the consideration, in whole or in part, is for money or other valuable thing won at any game or on a horse race, etc. Crawford v. Storms & Brooks, 41 Miss. 540 (1867).

The maker of a note, payable to a named individual or bearer, when sued by another than the party named as payee, may successfully defend by showing that the plaintiff won the note in a bet with the payee. Holman v. Ringo, 36 Miss. 690 (1859).

A note given for a gambling consideration may be declared void either at law or in a court of equity. McAuley's Adm'r v. Mardis, 1 Miss. (1 Walker) 307 (1828).

6. Recovery of money paid.

Money paid by mistake is recoverable and it is no defense to a suit therefor that the contract out of which the transaction sprung was an illegal one where resort to the contract is unnecessary to prove the plaintiff's case. Adler v. C.J. Searles & Co., 86 Miss. 406, 38 So. 209 (1905).

Judgments on any wager whatever are void under this section, and money lost on any wager can be recovered back by the loser. Campbell v. New Orleans Nat'l Bank, 74 Miss. 526, 21 So. 400 (1897), on suggestion of error, 74 Miss. 530, 23 So. 25 (1897).

RESEARCH REFERENCES

ALR. Action to recover money or property lost and paid through gambling as affected by statute of limitations. 22 A.L.R.2d 1390.

Criminal conspiracies as to gambling. 91 A.L.R.2d 1148.

Construction and application of state or municipal enactments relating to policy or numbers games. 70 A.L.R.3d 897.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 A.L.R.4th 801.

Private contests and lotteries: entrants' rights and remedies. 64 A.L.R.4th 1021.

Am Jur. 17A Am. Jur. 2d, Contracts § 322.

38 Am. Jur. 2d, Gambling §§ 129 et seq., 154 et seq.

7 Am. Jur. Pl & Pr Forms (Rev) Contracts, Forms 8, 9 (answers alleging as defenses that contract is void as against public policy, and for illegality).

CJS. 38 C.J.S., Gaming §§ 3, 4 et seq.

§ 87-1-3. Transfer of property to secure or pay, inures to wife and children of loser.

Any sale, mortgage, transfer, or conveyance of any estate, real or personal, to any person or to another for his use or benefit, or in any manner to satisfy or secure money or other thing won, or any part thereof, or to secure or satisfy any money or other thing lent or advanced on any consideration, foundation, or purpose mentioned in Section 87-1-1, or any part thereof, shall inure to and vest in the wife and children of said mortgagor, seller, vendor, bargainor, or lessor, the whole estate, title, and interest of such person sold, mortgaged, bargained, transferred, or conveyed, as though such person had died intestate. And the parties to any action founded on any contract or transaction within this chapter, shall be compelled to answer any bill of discovery touching the same.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3 (2); 1857, ch. 45, art. 2; 1871, § 1901; 1880, § 991; 1892, § 2115; 1906, § 2301; Hemingway's 1917, § 1911; 1930, § 1825; 1942, § 23.

Cross References — Mississippi Gaming Control Act, see § 75-76-1 et seq.

Inapplicability of this section to Mississippi Gaming Control Act, see § 87-1-7.

JUDICIAL DECISIONS

1. In general.

Where a bank knowingly advanced money for use in dealing in futures at a time when such contracts were unlawful, wife of borrower may have note and mortgage executed by herself and husband on their homestead and her separate property, to secure same, cancelled, whereupon the property would vest in herself and children; in such case it is immaterial that borrower had right to buy cotton futures by mail or wire from brokers in another state. Cohn v. Brinson, 112 Miss. 348, 73 So. 59, Am. Ann. Cas. 1918E,134 (1916).

§ 87-1-5. Loser may sue and recover money or property lost; exceptions.

If any person, by playing at any game whatever, or by betting on the sides or hands of such as do play at any game, or by betting on any horse race or cockfight, or at any other sport or pastime, or by any wager whatever, shall lose any money, property, or other valuable thing, real or personal, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, or his wife or children, may sue for and recover such money, property, or other valuable thing so lost and paid or delivered, or any part thereof, from the person knowingly receiving the same, with costs. However, this section shall not apply to betting, gaming or wagering:

(a) On a cruise vessel as defined in Section 27-109-1 whenever such vessel is in the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay;

(b) In a structure located in whole or in part on shore in any of the three (3) most southern counties in the State of Mississippi in which the registered voters of the county have voted to allow such betting, gaming or wagering on cruise vessels as provided in Section 19-3-79, if:

(i) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this section;

(ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in Section 29-15-1) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and

(iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii).

(c) On a vessel as defined in Section 27-109-1 whenever such vessel is on the Mississippi River or navigable waters within any county bordering on the Mississippi River; or

(d) That is legal under the laws of the State of Mississippi.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3 (3); 1857, ch. 45, art. 3; 1871, § 1902; 1880, § 992; 1892, § 2116; 1906, § 2302; Hemingway's 1917, § 1912; 1930, § 1826; 1942, § 24; Laws, 1989, ch. 481, § 1; Laws, 1990, ch. 449, § 3; Laws, 1990, ch. 573, § 7; Laws, 1990 Ex Sess, ch. 45 § 147; Laws, 2005, 5th Ex Sess, ch. 16, § 1, eff from and after passage (approved Oct. 17, 2005.)

Cross References — Elected or appointed official not to derive any pecuniary benefit as result of duties under this section, and penalties therefor, see § 25-4-119.

Licensing and regulation of cruise vessels, see § 27-109-1 et seq.

Mississippi Gaming Control Act, see § 75-76-1 et seq.

Inapplicability of this section to Mississippi Gaming Control Act, see § 87-1-7.

Forfeiture of moneys exhibited for purpose of betting, see § 97-33-17.

RESEARCH REFERENCES

ALR. Law of forum against wagering transaction as precluding enforcement of claim based on gambling transaction valid under applicable foreign law. 71 A.L.R.3d 178.

Private contests and lotteries: entrant's rights and remedies. 64 A.L.R.4th 1021.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool. 78 A.L.R.4th 483.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 A.L.R.4th 1048.

Am Jur. 38 Am. Jur. 2d, Gambling §§ 154, 159-161.

12 Am. Jur. Pl & Pr Forms (Rev) Gambling, Forms 11-14 (complaint, or declaration to recover gambling losses).

§ 87-1-7. Limitation on application of Sections 87-1-1 through 87-1-5.

Sections 87-1-1, 87-1-3 and 87-1-5 shall not apply to contracts for future delivery which are valid under succeeding sections of this chapter and shall not apply to activity which is lawfully conducted pursuant to the regulatory authority of the Mississippi Gaming Control Act (Section 75-76-1 et seq.)

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 3 (3); 1857, ch. 45, art. 3; 1871, § 1902; 1880, § 992; 1892, § 2116; 1906, § 2302; Hemingway's 1917, § 1912; 1930, § 1826; 1942, § 24; Laws, 1990 Ex Sess, ch. 45, § 84, eff from and after passage (approved June 29, 1990).

§ 87-1-9. Future contracts; definitions.

For the purposes of the following sections of this chapter the term "contract" shall be held to include sales, purchases, agreements of sale, agreements to sell and agreements to purchase, that the word "person" wherever used in the following sections shall be construed to import the plural or singular, as the case demands, and shall include individuals, associations, partnerships and corporations.

SOURCES: Codes, 1930, § 1827; 1942, § 25; Laws, 1928, ch. 304.

§ 87-1-11. Certain exchanges authorized.

There may be organized in any city in the State of Mississippi voluntary associations to be known as cotton exchanges, grain exchanges, boards of trade or similar institutions to receive and post quotations on cotton, grain, stocks, bonds and other commodities for the benefit of its members and other persons engaged in the production of cotton, grain and other commodities. Such associations shall adopt a uniform set of rules and regulations not incompatible with the laws, as are usual for such associations. They shall open their books to the inspection of proper courts and officers of the law when required.

SOURCES: Codes, 1930, § 1834; 1942, § 32; Laws, 1928, ch. 304.

Cross References — Regulation of transfer of investment securities under the Uniform Commercial Code, see §§ 75-8-101 et seq.

§ 87-1-13. Who may provide market quotations by wire.

Only members of cotton exchanges, grain exchanges, boards of trade or similar institutions organized under the laws of Mississippi or any other state may provide for their use and the use of their clients, private or public wires from cities in Mississippi where such cotton exchanges, grain exchanges, boards of trade or similar institutions are located to other cities without the State of Mississippi where cotton exchanges, grain exchanges, boards of trade or similar institutions are operated, and may receive over such private or public wires and post for their own use and that of their clients and of any person engaged in the production of cotton, grain or other commodities, market quotations and market news, covering cotton, grain, stocks and other commodities, and transmit for execution contracts of sale for future delivery. In all cases it is contemplated that the delivery of the commodity purchased or sold, as the case may be, will be carried out by the principals or their successors or assignees; and that the contract for delivery thereof will be performed or discharged according to the rules of the exchange, board of trade or similar institutions where the contract is executed.

SOURCES: Codes, 1930, § 1835; 1942, § 33; Laws, 1928, ch. 304.

§ 87-1-15. When contracts of sale for future delivery of cotton, grain, stock, or other commodities enforceable.

(1) All contracts of sale for future delivery of cotton, grain, stock, or other commodities (a) made in accordance with the rules of any board of trade, exchange or similar institution where such contracts of sale are executed; and (b) actually executed on the floor of such board of trade, exchange or similar institutions and performed or discharged according to the rules thereof; and (c) when such contracts of sale are made with or through a regular member in good standing of a cotton exchange, grain exchange or similar institution organized under the laws of the State of Mississippi or any other state shall be, and they are hereby declared to be, valid and enforceable in the courts of this state according to their terms.

(2) Notwithstanding the provisions of subsection (1) of this section, contracts of sale for the future delivery of cotton in order to be valid and enforceable must not only conform to the requirements of clauses (a), (b) and (c) of subsection (1) of this section, but must also be made subject to the provisions of the United States Internal Revenue Code of 1954, subchapter D. In the event, however, that this subsection be held inoperative for any reason, then contracts for the future delivery of cotton shall be valid and enforceable if they conform to the requirements of clauses (a), (b) and (c) of subsection (1) of this section.

(3) If contracts of sale for future delivery of cotton, grain, stock, or other commodity shall conform to all of the requirements set forth above in this section, then the same shall be valid and enforceable in all the courts of this state, notwithstanding that at the time of execution of such contracts that either or both of the parties thereto did not contemplate or intend that the same should be consummated by the actual delivery and receipt of the commodity specified. The plain intent of this section, while declaring unlawful all transactions conducted in and through a "bucket shop" as hereinafter defined, is to make lawful and enforceable and to withdraw from the provisions of the gaming and wagering laws, all transactions executed upon and in accordance with the rules of a legitimate cotton, grain, stock or other commodity exchange or board of trade whether the intent of delivery of the actual commodity was present or not and this section shall be liberally construed at all times so as to effectuate this purpose.

SOURCES: Codes, 1930, § 1828; 1942, § 26; Laws, 1928, ch. 304; Laws, 1956, ch. 229.

Cross References — "Bucket shop" defined, see § 87-1-21.

JUDICIAL DECISIONS

1. In general.

Forward contract for future delivery of cotton was not void as being a futures contract where there was provision for delivery by the seller of cotton sold. Austin v. Montgomery, 336 So. 2d 745 (Miss. 1976).

This section does not make an arbitrary distinction between brokerage houses which have connections with commodity exchanges and those which do not, and consequently does not violate due process. Kohlmeyer & Co. v. Rotwein, 186 So. 2d 768 (Miss. 1966), cert. denied, 385 U.S. 971, 87 S. Ct. 508, 17 L. Ed. 2d 435 (1966).

This section does not violate the public policy of Mississippi against gambling. Kohlmeyer & Co. v. Rotwein, 186 So. 2d 768 (Miss. 1966), cert. denied, 385 U.S. 971, 87 S. Ct. 508, 17 L. Ed. 2d 435 (1966).

The fact that the State of Mississippi does not have the power to control the rules and regulations adopted by commodity exchanges beyond its borders does not make this section an unconstitutional delegation of legislative power. Kohlmeyer & Co. v. Rotwein, 186 So. 2d 768 (Miss. 1966), cert. denied, 385 U.S. 971, 87 S. Ct. 508, 17 L. Ed. 2d 435 (1966).

In brokers' suit to recover money paid client under mistaken belief that margin of client was greater than needed, evidence as to whether contract between client and broker was gambling contract held for jury, even though contract had appearance of legality, and stated that actual delivery of commodities bought or sold was contemplated. Knox v. Clark, 177 Miss. 195, 171 So. 340 (1936).

Intention of both parties to contract for future delivery that transaction was to be closed by settlement of difference between price when made and price at time of closing may be shown by what parties said and did in respect of contract. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Where there is substantial evidence that will support inference that both parties did not intend actual delivery under contract for future delivery, question is for jury. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Where evidence of seller of corn for future delivery on board of trade tended to show that neither seller nor brokers intended actual delivery but that cash settlement of difference between contract price and market price at time fixed for delivery should be made, direction of verdict for brokers was error. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Notwithstanding statute relating to contracts for future delivery of commodities according to rules of boards of trade or exchanges, formal contract is not conclusive where other evidence discloses that it was used as a means of dealing in futures. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling §§ 37, 144, 147-153.

§ 87-1-17. Brokers may recover certain advances.

Any broker, agent or any other person making advances to or for account of any party to any contract falling within and satisfying the provisions of Section 87-1-15 shall be entitled to recover the amount of such advances from the party to, or for account of whom, the advances were made.

SOURCES: Codes, 1930, § 1829; 1942, § 27; Laws, 1928, ch. 304.

§ 87-1-19. When contracts of sale for future delivery of cotton, grain, stocks, or other commodities unenforceable.

Any contract of sale for the future delivery of cotton, grain, stocks, or other commodities, which is to be settled according to or upon the basis of the public market quotations or prices made on any board of trade, exchange or similar institutions, upon which contracts of sale for future delivery are executed and dealt in without any actual bona fide execution and the carrying out or discharge of such contracts upon the floor of such exchange, board of trade or similar institution, in accordance with the rules thereof, shall be null and void and unenforceable in any court of this state, and no action shall lie thereon at the suit of any party thereto.

SOURCES: Codes, 1930, § 1830; 1942, § 28; Laws, 1928, ch. 304.

JUDICIAL DECISIONS

1. In general.

Where the legislature passed a law authorizing brokers to transmit for execution contracts for sale for future delivery, the legislature did not intend to change the law providing that any contract of sale for future delivery of cotton made without any actual bona fide execution in carrying out such contract shall be void and unenforceable. Laird, Bissell & Meeds v. Capps, 224 Miss. 361, 80 So. 2d 49 (1955).

Sales of cotton futures, where there was no contemplation of actual delivery of cotton, were not valid despite the statute which authorized brokers to transmit for execution contracts for sale for future delivery. Laird, Bissell & Meeds v. Capps, 224 Miss. 361, 80 So. 2d 49 (1955).

A hedging contract contemplated by this section is void and can furnish no foundation upon which to predicate a civil claim for damages. Capps v. Postal Telegraph-Cable Co., 197 Miss. 118, 19 So. 2d 491 (1944).

Telegraph company is not liable for failure to send telegram to firm's officer informing of sale of cotton by firm, delivery to be made at future date, for sole purpose of having officer make hedging contract with firm's brokers on New York exchange to protect firm against any rise in price that the firm would have to pay for the cotton, since reliance on the holding contract, which is void under the statute, is essential to plaintiffs' case. Capps v. Postal Telegraph-Cable Co., 197 Miss. 118, 19 So. 2d 491 (1944).

In brokers' suit to recover money paid client under mistaken belief that margin of client was greater than needed, evidence as to whether contract between client and broker was gambling contract held for jury, even though contract had appearance of legality, and stated that actual delivery of commodities bought or sold was contemplated. Knox v. Clark, 177 Miss. 195, 171 So. 340 (1936).

Notwithstanding statute relating to contracts for future delivery of commodities according to rules of boards of trade or exchanges, formal contract is not conclusive where other evidence discloses that it was used as a means of dealing in futures. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Intention of both parties to contract for future delivery that transaction was to be closed by settlement of difference between price when made and price at time of closing may be shown by what parties said and did in respect of contract. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Where there is substantial evidence that will support inference that both parties did not intend actual delivery under contract for future delivery, question is for jury. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

Where evidence of seller of corn for future delivery on board of trade tended to show that neither seller nor brokers intended actual delivery but that cash settlement of difference between contract price and market price at time fixed for delivery should be made, direction of verdict for brokers was error. Alamaris v. John F. Clark & Co., 166 Miss. 122, 145 So. 893 (1933).

§ 87-1-21. "Bucket shop" defined.

A "bucket shop" is hereby defined to be and mean any place of business wherein are made contracts of the sort or character denounced by Section 87-1-19, and the maintenance or operation of a bucket shop at any point in this state is hereby prohibited.

SOURCES: Codes, 1930, § 1831; 1942, § 29; Laws, 1928, ch. 304.

§ 87-1-23. Penalties.

Any person either as agent or principal, who knowingly enters into or assists in making any contracts of sale of the sort or character denounced by Section 87-1-19 for the future delivery of cotton, grain, stocks or other commodities, or who maintains or operates a bucket shop as that term is defined in Section 87-1-21, shall be guilty of a felony, and upon conviction thereof shall be fined in a sum not to exceed One Thousand Dollars ($1,000.00), or be imprisoned in the penitentiary not exceeding two (2) years, and any person who shall be guilty of a second offense under this chapter, in addition to the penalties above described, may upon conviction, be both fined and imprisoned in the discretion of the court, and if a corporation, it shall be liable to forfeiture of all its rights and privileges as such, and the continuance of such establishment after the first conviction shall be deemed a second offense. It shall be the duty of the attorney general to institute proceedings for the forfeiture of the charter of any corporation making itself liable to such forfeiture under the provisions of this chapter.

SOURCES: Codes, 1930, § 1833; 1942, § 31; Laws, 1928, ch. 304.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any felony violation, see § 99-19-73.

§ 87-1-25. Unlawful to rent or lease premises to be used for conducting business prohibited by this chapter.

Any person, whether as agent or owner, who shall rent or lease any office or place of business to any person, association of persons or corporation, to be used in, or for the purpose of negotiating or effectuating the class of contracts prohibited by this chapter, knowing such person, association of persons or corporation to be engaged in such business, shall be guilty of a misdemeanor, and on conviction shall be punished as provided by law.

SOURCES: Codes, Hemingway's 1917, § 1923; 1930, § 1836; 1942, § 34; Laws, 1908, ch. 118.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

§ 87-1-27. Gambling and future contracts; witnesses denied privilege against self incrimination.

No person shall be excused in any prosecution under Sections 87-1-1 through 87-1-25, concerning gambling and future contracts, from testifying touching anything done by himself or others, contrary to the provisions of said sections; but any discovery made by a witness upon such examination shall not be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him.

SOURCES: Codes, Hemingway's 1917, § 1917; 1930, § 1837; 1942, § 35; Laws, 1908, ch. 118.

Cross References — Witness in gaming case being required to testify although it may incriminate him, see § 99-17-27.

RESEARCH REFERENCES

Lawyers' Edition. Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination-Supreme court cases. 32 L. Ed. 2d 869.

§ 87-1-29. Principal entitled to certain written information.

Every person shall furnish upon demand to any principal for whom such person has executed any contract of sale for the future delivery of any cotton, grain, stocks or other commodities a written instrument setting forth the name and location of the exchange, board of trade or similar institution upon which such contract has been executed, the date of execution of the contract and the name and address of the persons with whom such contract was executed and if such person shall refuse or neglect to furnish such statement upon reasonable demand, such refusal or neglect shall be prima facie evidence that such contract was an illegal contract within the provisions of Section 87-1-19, and that the person who executed it was engaged in the maintenance and operation of a "bucket shop" within the provisions of Section 87-1-21.

SOURCES: Codes, 1930, §§ 1830, 1832; 1942, § 30; Laws, 1928, ch. 304.

§ 87-1-31. Prohibition against buying or selling futures.

If any person shall buy or sell commodities of any kind, to be delivered at a future day, without agreeing and intending that the commodities are to be actually delivered in kind, and the price paid, he shall be guilty of a misdemeanor, and, on conviction, shall be punished as prescribed in section 87-1-33.

SOURCES: Codes, 1892, § 1121; 1906, § 1202; Hemingway's 1917, § 932; 1930, § 959; 1942, § 2189.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

The sale of cotton on call did not constitute gambling in futures, where the cotton thus sold contemplated actual delivery and not a settlement alone on the market quotations, although it would be a gambling transaction if the real intent of the parties was simply to speculate on the rise and fall of prices, and the goods were not to be delivered. Kiersky v. Hyman Mercantile Co., 192 Miss. 195, 198 So. 574 (1940).

Public policy of state is to condemn "dealing in futures." Ascher & Baxter v. Edward Moyse & Co., 101 Miss. 36, 57 So. 299 (1910).

Mississippi courts cannot deny to a judgment of a Missouri court, based upon an award in arbitration the full faith and credit secured by U. S. Const. Art. 4 § 1, to the judgments of sister states, simply because the original controversy grew out of a gambling transaction in futures in Mississippi, a misdemeanor under Mississippi law, which further provide that contracts of that character shall not be enforced by any court. Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908).

The Mississippi courts are not without jurisdiction of causes of action arising out of gambling transactions in futures because of the provision of Miss. Code 1892 § 2117, that contracts of that character "shall not be enforced by any court," since such statute only lays down a rule of decision. Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling §§ 37, 144 et seq., 165, 166.

§ 87-1-33. Penalty for dealing in futures.

If any person shall deal in contracts called "futures," or shall, by himself or his agent, directly or indirectly buy or sell any "future" contract, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00), and be imprisoned in the county jail not more than three (3) months.

SOURCES: Codes, 1892, § 1120; 1906, § 1201; Hemingway's 1917, § 931; 1930, § 958; 1942, § 2188; Laws, 1882, p. 140.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

JUDICIAL DECISIONS

1. In general.

Note in payment of debt under futures contract cannot be enforced by innocent transferee for value. Gray v. Robinson, 95 Miss. 1, 48 So. 226 (1909).

A note given to a firm of brokers to close a balance advanced by them on behalf of the maker in dealings they had conducted for him in wheat futures on the board of trade of another state is void. Nixon v. Seal, 27 So. 875 (Miss. 1900).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Gambling §§ 37, 144 et seq., 165, 166.

CHAPTER 3

Power and Letters of Attorney

In General 87-3-1
Uniform Durable Power of Attorney Act 87-3-101

IN GENERAL

Sec.
87-3-1. Letters may be acknowledged and recorded.
87-3-3. Conveyances by attorney in fact.
87-3-5. When process may be executed on attorney.
87-3-7. Special form not required; gifts given under a power of attorney.
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87-3-11. Form to represent party in administration of estate.
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87-3-15. Death not an absolute revocation.
87-3-17. Revocation of letters of attorney recordable.

§ 87-3-1. Letters may be acknowledged and recorded.

All letters of attorney intended to be used in this state may be acknowledged or proved as conveyances of land are required to be, and, when so acknowledged or proved, may be recorded in like manner; and copies thereof, duly certified, shall be admitted in evidence, without accounting for the nonproduction of the original.

SOURCES: Codes, 1857, ch. 37, art. 1; 1871, § 1895; 1880, § 1179; 1892, § 193; 1906, § 199; Hemingway's 1917, § 2893; 1930, § 2948; 1942, § 244.

Cross References — Invalidity of power of attorney for confessing judgment, see § 11-7-187.

Signing of commercial paper by authorized representative, see § 75-3-403.

JUDICIAL DECISIONS

1. In general.

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Parties to controversy involving validity and effect of power of attorney which has not been acknowledged and recorded in manner of conveyance of land with respect to conveyance of real property situated in Greece may stipulate to application and enforcement of Mississippi rules of law, rather than otherwise applicable Greek law; if parties do so, trial judge may proceed to adjudge all issues according to Mississippi law and enter final judgment which, subject to appeal, would be enforceable against parties in courts of Mississippi, even though, in Republic of Greece, judgment may not be enforceable. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Power of attorney need not be acknowledged or recorded in manner of instrument of conveyance of interest in land in order to authorize attorney in fact to make contracts on behalf of principal and to deal with personal property in Mississippi in which principal holds interest. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Before one empowered as attorney in fact may execute and deliver valid instrument of conveyance of interest in land in Mississippi prior in right to interests of (1) subsequent purchasers for value without notice or (2) subsequent judgment lien creditors, written power of attorney must be acknowledged and recorded in conformity with requirements generally applicable to instruments of conveyance of interests in land. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Before court may resolve question of whether power of attorney which has not been acknowledged and recorded in manner provided for instruments of conveyance of interests in land is valid and enforceable with respect to real property located in Republic of Greece, Greek law must be consulted to determine whether there is conflict between laws of Mississippi and those of Greece with respect to real property and powers of attorney. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

RESEARCH REFERENCES

ALR. What constitutes power coupled with interest within rule as to termination of agency. 28 A.L.R.2d 1243.

Am Jur. 3 Am. Jur. 2d, Agency §§ 8, 21.

1B Am. Jur. Legal Forms 2d, Agency §§ 14:99 et seq. (powers of attorney).

CJS. 2A C.J.S., Agency § 24.

§ 87-3-3. Conveyances by attorney in fact.

Conveyances of land, or contracts relating thereto, executed by an attorney in fact for his principal, and duly acknowledged or proved, shall have the same force and effect as if executed and acknowledged by the principal; and where a conveyance by an attorney is in execution of letters of attorney, so acknowledged or proved and recorded, it shall pass the interest of the principal though not formally executed in his name.

SOURCES: Codes, 1857, ch. 37, art. 2; 1871, § 1896; 1880, § 1180; 1892, § 194; 1906, § 200; Hemingway's 1917, § 2894; 1930, § 2949; 1942, § 245.

Cross References — Necessity that land conveyances be in writing, see § 89-1-3.

JUDICIAL DECISIONS

1. In general.

Where a deed was first conveyed to a grandson by the decedent, then conveyed back to the estate, then conveyed to the grandson again by the executrix, acting under a purported power of attorney, and when the executrix sought to set aside the deed after the grandson died, and the property was to go to the grandson's surviving wife, based on equity, the deed was not void ab initio when signed by the executrix even though letters of attorney were never recorded. Estate of Dykes v. Estate of Williams, 864 So. 2d 926 (Miss. 2003).

Before court may resolve question of whether power of attorney which has not been acknowledged and recorded in manner provided for instruments of conveyance of interests in land is valid and enforceable with respect to real property located in Republic of Greece, Greek law must be consulted to determine whether there is conflict between laws of Mississippi and those of Greece with respect to real property and powers of attorney. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Parties to controversy involving validity and effect of power of attorney which has not been acknowledged and recorded in manner of conveyance of land with respect to conveyance of real property situated in Greece may stipulate to application and enforcement of Mississippi rules of law, rather than otherwise applicable to Greek law; if parties do so, trial judge may proceed to adjudge all issues according to Mississippi law and enter final judgment which, subject to appeal, would no doubt be enforceable against parties in courts of Mississippi, even though, in Republic of Greece, judgment may not be enforceable. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

Power of attorney need not be acknowledged or recorded in manner of instrument of conveyance of interest in land in order to authorize attorney in fact to make contracts on behalf of principal and to deal with personal property in Mississippi in which principal holds interest; however, before one empowered as attorney in fact may execute and deliver valid instrument of conveyance of interest in land in Mississippi prior in right to interests of (1) subsequent purchasers for value without notice or (2) subsequent judgment lien creditors, written power of attorney must be acknowledged and recorded in conformity with requirements generally applicable to instruments of conveyance of interests in land. Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985).

This section has no application to contracts by an attorney in fact for the making of a lease. Hytken v. Bianca, 186 Miss. 323, 186 So. 624 (1939), error overruled, 186 Miss. 343, 188 So. 311 (1939).

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives." Allen v. Alliance Trust Co., 84 Miss. 319, 36 So. 285 (1903).

It is always a question of intention whether or not an instrument be an execution of a power. Yates v. Clark, 56 Miss. 212 (1878).

RESEARCH REFERENCES

Am Jur. 1B Am. Jur. Pl & Pr Forms (Rev), Agency, Form 312 (complaint, petition, or declaration-by devisees of principal-for recovery of property fraudulently conveyed by attorney in fact-for damages).

1B Am. Jur. Legal Forms 2d, Agency §§ 14:75 et seq. (powers of attorney).

§ 87-3-5. When process may be executed on attorney.

When a person interested in the administration of an estate in any court in this state, shall appoint an attorney in fact, resident in the county where the court is held, to represent him therein, and shall cause the letter of appointment to be filed in the office of the clerk of the court in which the estate is administered, where it shall have the same effect as a demand for notice of an order or filing concerning the decedent's estate, all process issued from the court touching the estate may be executed on such attorney, and, when so executed, shall have the same force and effect as if executed on the principal in person.

SOURCES: Codes, 1857, ch. 37, art. 4; 1871, § 1898; 1880, § 1181; 1892, § 195; 1906, § 201; Hemingway's 1917, § 2895; 1930, § 2950; 1942, § 246; Laws, 1994, ch. 336, § 6, eff from and after July 1, 1994.

Editor's Note — Laws of 1994, ch. 336, §§ 9 and 10 provide:

"SECTION 9. This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

"SECTION 10. This act may be cited as the "Uniform Durable Power of Attorney Act."

Laws of 1994, ch. 336, amended this section and Section 87-3-15, added Sections 87-3-101 through 87-3-113, and repealed Section 87-3-13.

§ 87-3-7. Special form not required; gifts given under a power of attorney.

(1) A letter of attorney to transact any business need only express plainly the authority conferred.

(2) If any power of attorney or other writing (a) authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do, or (b) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to any organizations described in Sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.

(3) Subsection (2) as set forth above is declaratory of past and present law in the State of Mississippi, and shall be applied to all powers of attorney, whether executed before, on or after March 16, 1999.

SOURCES: Codes, 1880, § 1186; 1892, § 201; 1906, § 207; Hemingway's 1917, § 2901; 1930, § 2956; 1942, § 252; Laws, 1999, ch. 405, § 1, eff from and after passage (approved Mar. 16, 1999.)

Federal Aspects — Sections 170(c) and 2522(a) of the Internal Revenue Code, see 26 USCS §§ 170(c) and 2522(a), respectively.

JUDICIAL DECISIONS

1. In general.

Trial court did not err in failing to enforce an arbitration provision contained within an admission agreement entered into between a nursing home and a resident's daughter who assertedly operated under a power of attorney because only an unauthenticated copy of the power of attorney appeared in the record. Miss. Care Ctr. of Greenville, LLC v. Hinyub, 975 So. 2d 211 (Miss. 2008).

The joint owner of three certificates of deposit was entitled to them by right of survivorship where the decedent's attorney in fact under a power of attorney placed the joint owner's name on the certificates of deposit, the attorney in fact and the joint owner never shared a confidential relationship while the attorney in fact acted for the decedent, and there was no evidence that the attorney in fact acted in bad faith. Ford v. Reilly, 784 So. 2d 935 (Miss. 2001).

§ 87-3-9. Form of letter of attorney to convey land.

"Know all, that I, George Poindexter, of ________ county, Mississippi, do hereby appoint Albert Brown, of ________ county, my attorney in fact, with full power to sell and convey in fee simple, with general warranty [or without warranty, as the case may be] of title, that land situated in [describe it].

"Witness my signature, the ________ of ________, A. D. ________.

"George Poindexter."

SOURCES: Codes, 1880, § 1184; 1892, § 199; 1906, § 205; Hemingway's 1917, § 2899; 1930, § 2954; 1942, § 250.

RESEARCH REFERENCES

Am Jur. 1B Am. Jur. Legal Forms 2d, Agency § 14:103 (power of attorney to sell, convey, and receive purchase price for realty).

§ 87-3-11. Form to represent party in administration of estate.

"Know all, that I, C. C. Claiborne, of ________ county, Mississippi, do hereby constitute Gerard C. Brandon, of ________ county, in said state, my attorney in fact to represent me in the chancery court of said county of ________, in all matters pertaining to the administration in said court of the estate of Phoebe Jones, in which I am interested as an heir and distributee; and I consent that all process issued from said court touching said estate may be executed on my said attorney.

"Witness my signature, the ________ day of ________, A.D. ________ .

"C. C. Claiborne."

SOURCES: Codes, 1880, § 1185; 1892, § 200; 1906, § 206; Hemingway's 1917, § 2900; 1930, § 2955; 1942, § 251.

§ 87-3-13. Repealed.

Repealed by Laws, 1994, ch. 336, § 8, eff from and after July 1, 1994.

Codes, 1892, § 198; 1906, § 204; Hemingway's 1917, § 2898; 1930, § 2953; 1942, § 249; Laws, 1982, ch. 335, §§ 1, 2]

Editor's Note — Former § 87-3-13 was entitled: Continuance of power; disability or incompetence of principal.

§ 87-3-15. Death not an absolute revocation.

The death of the principal shall not operate a revocation of an agency created by him, other than by writing, as to one who, without notice of such death, in good faith and under circumstances repelling the imputation to him of fraud or negligence, deals with such agent.

SOURCES: Codes, 1880, § 1183; 1892, § 197; 1906, § 203; Hemingway's 1917, § 2897; 1930, § 2952; 1942, § 248; Laws, 1994, ch. 336, § 7, eff from and after July 1, 1994.

Editor's Note — Laws of 1994, ch. 336, §§ 9 and 10 provide:

"SECTION 9. This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

"SECTION 10. This act may be cited as the "Uniform Durable Power of Attorney Act."

Laws of 1994, ch. 336, amended this section and Section 87-3-5, added Sections 87-3-101 through 87-3-113, and repealed Section 87-3-13.

§ 87-3-17. Revocation of letters of attorney recordable.

Any writing revoking letters of attorney may, when acknowledged or proved as conveyances of land are required to be acknowledged or proved, be recorded in like manner, and with like effect from the time of being filed for record, in the office in which the letters revoked were recorded.

SOURCES: Codes, 1880, § 1182; 1892, § 196; 1906, § 202; Hemingway's 1917, § 2896; 1930, § 2951; 1942, § 247.

UNIFORM DURABLE POWER OF ATTORNEY ACT

SEC.	
87-3-101.	Short title.
87-3-103.	Application and construction of sections 87-3-101 through 87-3-113.
87-3-105.	Definition.
87-3-107.	Durable power of attorney not affected by lapse of time, disability or incapacity.
87-3-109.	Relation of attorney in fact to court-appointed fiduciary.
87-3-111.	Power of attorney not revoked until notice.
87-3-113.	Proof of continuance of durable and other powers of attorney by affidavit.

§ 87-3-101. Short title.

Sections 87-3-101 through 87-3-113 may be cited as the "Uniform Durable Power of Attorney Act."

SOURCES: Laws, 1994, ch. 336, § 10, eff from and after July 1, 1994.

Editor's Note — Laws of 1994, ch. 336, § 10 provides:

"SECTION 10. This act may be cited as the "Uniform Durable Power of Attorney Act."

Laws of 1994, ch. 336, added Code Sections 87-3-101 through 87-3-113, amended Sections 87-3-5 and 87-3-15, and repealed Section 87-3-13.

Comparable Laws from other States — California: Cal Prob Code § 4000 et seq.
Colorado: C.R.S. 15-14-701 et seq.
Hawaii: HRS § 551D-1 et seq.
Idaho: Idaho Code § 15-12-101 et seq.
North Dakota: N.D. Cent. Code, §§ 30.1-30-01 et seq.
Oklahoma: 58 Okl. St. § 1071 et seq.
Tennessee: Tenn. Code Ann., §§ 34-6-101 et seq.
Virgin Islands: 15 V.I.C. § 1261 et seq.
West Virginia: W. Va. Code § 39-4-1 et seq.

§ 87-3-103. Application and construction of sections 87-3-101 through 87-3-113.

Sections 87-3-101 through 87-3-113 shall be applied and construed to effectuate their general purpose to make uniform the law with respect to the subject of these sections among states enacting the Uniform Durable Power of Attorney Act.

SOURCES: Laws, 1994, ch. 336, § 9, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 36, 53, 55.

§ 87-3-105. Definition.

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

SOURCES: Laws, 1994, ch. 336, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 36, 53, 55.

§ 87-3-107. Durable power of attorney not affected by lapse of time, disability or incapacity.

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

SOURCES: Laws, 1994, ch. 336, § 2, eff from and after July 1, 1994.

JUDICIAL DECISIONS

1. Contingency fee contracts.

Where the attorneys in fact entered into a contract of employment with an attorney to pursue a personal injury claim on the ward's behalf, and the attorney, primarily out of caution, later submitted a proposed settlement to the chancery court for approval, the chancery court abused its discretion in reducing the lawyer's fee from a 40 percent contingency fee as provided in the contract to a 33 1/3 percent contingency fee. The contract was not one entered into pursuant to a traditional probate matter and it was not a contract within the parameters of Miss. Unif. Ch. Ct. R. 6.12; the practical effect of the chancellor's decision, upheld by the court of appeals, was a judicial abrogation of the provisions of the Uniform Durable Power of Attorney Act found in Miss. Code Ann. §§ 87-3-101 through 87-3-113 and it also constituted a failure to uphold Miss. Const. art. 3, § 16 and U.S. Const. Art. I, § 10, cl. 1, which prohibited the impairment of obligations of contracts. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 36, 53, 55.

§ 87-3-109. Relation of attorney in fact to court-appointed fiduciary.

(1) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(2) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration

by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

SOURCES: Laws, 1994, ch. 336, § 3, eff from and after July 1, 1994.

JUDICIAL DECISIONS

1. Construction.
2. Contingency fee contracts.

1. Construction.

Under Miss. Code Ann. § 87-3-109(1), the attorney in fact and the fiduciary are clearly set out as two separate entities. Also, the statute states "if" a trial court appoints a conservator, etc., thus clearly revealing that such an appointment is not required. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

2. Contingency fee contracts.

Where the attorneys in fact entered into a contract of employment with an attorney to pursue a personal injury claim on the ward's behalf, and the attorney, primarily out of caution, later submitted a proposed settlement to the chancery court for approval, the chancery court abused its discretion in reducing the lawyer's fee from a 40 percent contingency fee as provided in the contract to a 33 1/3 percent contingency fee. The contract was not one entered into pursuant to a traditional probate matter and it was not a contract within the parameters of Miss. Unif. Ch. Ct. R. 6.12; the practical effect of the chancellor's decision, upheld by the court of appeals, was a judicial abrogation of the provisions of the Uniform Durable Power of Attorney Act found in Miss. Code Ann. §§ 87-3-101 through 87-3-113 and it also constituted a failure to uphold Miss. Const. art. 3, § 16 and U.S. Const. Art. I, § 10, cl. 1, which prohibited the impairment of obligations of contracts. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 34, 55.

§ 87-3-111. Power of attorney not revoked until notice.

(1) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(2) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

SOURCES: Laws, 1994, ch. 336, § 4, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 52, 53.

§ 87-3-113. Proof of continuance of durable and other powers of attorney by affidavit.

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

SOURCES: Laws, 1994, ch. 336, § 5, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency §§ 26, 36, 53, 55.

CJS. 3 C.J.S., Agency § 512.

CHAPTER 5

Principal and Surety

Sec.	
87-5-1.	Surety discharged if creditor fails to sue the principal debtor when notified.
87-5-3.	Surety paying or tendering the debt.
87-5-5.	Surety company may maintain action against defaulting principal.
87-5-7.	Surety or indorser, when sued alone, must notify principal and make defense.
87-5-9.	Surety paying a judgment.
87-5-11.	Bona fide purchasers and encumbrancers protected.
87-5-13.	Execution against principal and sureties; how served.

§ 87-5-1. Surety discharged if creditor fails to sue the principal debtor when notified.

Any person bound as surety or accommodation indorser for another, may, at any time after the debt has become due or liability been incurred, give notice in writing to the creditor to commence and prosecute legal proceedings against the principal debtor, if living and resident within this state, for the recovery of the debt; and if the creditor fails to commence legal proceedings by the next term of the court in which the same shall be instituted, to be held after the expiration of thirty (30) days from the giving of the notice, and to prosecute the same to effect, the surety who shall have given the notice shall be discharged from liability. It shall not be lawful to plead or to give in evidence under this section a notice not in writing, and any act of the creditor shall not be a waiver of notice in writing as herein required.

SOURCES: Codes, 1857, ch. 46, art. 1; 1871, § 2257; 1880, § 997; 1892, § 3276; 1906, § 3731; Hemingway's 1917, § 2907; 1930, § 2957; 1942, § 253.

Cross References — Final judgment upon garnishment against surety or accommodation indorser, see § 11-35-55.

Order of liability of indorsers of commercial paper, see § 75-3-414.

Suits on indorsed bills and notes, see § 75-13-3.

Effect of releasing one or more joint debtors, see § 85-5-1.

JUDICIAL DECISIONS

1. Construction and application.
2. Sufficiency of notice.
3. Waiver of right to discharge from liability.

1. Construction and application.

Where a contract under which a landowner agreed to be obligated to a lender for the debts of his tenant, was one of guaranty rather than suretyship, and further provided that the lender was not bound to exhaust its recourse against the tenant before being entitled to payment from the landowner, the landowner's demand that the lender proceed against the tenant did not affect its liability for the unpaid loans. Brent v. National Bank of Commerce, 258 So. 2d 430 (Miss. 1972).

This provision must be strictly construed. Standard Acc. Ins. Co. v. Standard Oil Co., 242 Miss. 11, 133 So. 2d 539 (1961).

This section is not applicable to release a surety on a public construction bond from liability to a subcontractor's supplier. Standard Acc. Ins. Co. v. Standard Oil Co., 242 Miss. 11, 133 So. 2d 539 (1961).

Where mortgagee looked to others than mortgagors for payment of indebtedness for ten years after conveyance by mortgagors to purchasers who assumed indebtedness, gave no notice to mortgagor of invalid foreclosure proceeding, and allowed principal and interest to remain in default for several years without suit, mortgagor held not discharged as surety for her grantees, because of mortgagee's want of diligence, especially where mortgagor made no attempt to put creditor in default under statute. North Am. Life Ins. Co. v. Smith, 178 Miss. 238, 172 So. 135 (1937).

Mere want of diligence, indulgence, delay not amounting to bar of statute of limitations, or passiveness of creditor towards principal debtor, does not discharge surety. North Am. Life Ins. Co. v. Smith, 178 Miss. 238, 172 So. 135 (1937).

Indulgences granted to maker of note by holder held not to relieve one who signed note as surety and accommodation indorser from liability on note, where indulgences were not for definite time or supported by consideration. Love v. Clark, 171 Miss. 758, 158 So. 484 (1935).

Suit by nonresident in federal court having jurisdiction was sufficient compliance with statute requiring proceedings after notice in writing by surety. Mississippi Valley Trust Co. v. Brewer, 157 Miss. 890, 128 So. 83 (1930).

That suit instituted by creditor after written notice by surety had not progressed to judgment did not establish that it was not prosecuted to effect. Mississippi Valley Trust Co. v. Brewer, 157 Miss. 890, 128 So. 83 (1930).

This section is not repealed by the Negotiable Instruments Act. First Nat'l Bank v. Rau, 146 Miss. 520, 112 So. 688 (1927); North Am. Life Ins. Co. v. Smith, 178 Miss. 238, 172 So. 135 (1937).

Bank does not owe surety on note duty to apply or credit amount principal may have on deposit at or after maturity of the note to the payment thereof. Moreland v. People's Bank of Waynesboro, 114 Miss. 203, 74 So. 828 (1917).

Where the principal in consideration of a trust deed to secure the indebtedness granted an extension of time for a definite period, the sureties were relieved. Miller v. Lewis, 103 Miss. 598, 60 So. 654 (1913).

A judgment discharging a surety by reason of his release, under this section, if such judgment is not appealed from, will bar a proceeding for contribution by a co-surety held liable in the same judgment, and the discharge of one surety does not discharge his co-sureties. Ruff v. Montgomery, 83 Miss. 185, 36 So. 67 (1904).

A plea setting up a discharge under the statute, which does not show compliance with it, is defective. Keirn v. Andrews, 59 Miss. 39 (1881).

The statute applies to all the modes and instruments by which suretyship may arise, and the surety's discharge under the statute is as effectual in a court of law as in equity. Smith v. Clopton, 48 Miss. 66 (1873).

2. Sufficiency of notice.

Letter held to be sufficient notice. Bishop v. Currie-McGraw Co., 133 Miss. 517, 97 So. 886 (1923).

Notice such as will discharge a surety must be clear and explicit, and must amount to a demand that the creditor commence and prosecute legal proceedings against the principal debtor. Graham v. Pepple, 132 Miss. 612, 97 So. 180, 30 A.L.R. 1278 (1923).

Notice given by one surety in his own behalf will not inure to the benefit of his co-sureties, and failing to sue after such notice will not discharge such co-sureties. Ramey v. Purvis, 38 Miss. 499 (1860).

3. Waiver of right to discharge from liability.

Where a tenant's past due notes were renewed at the request of the landowner who was obligated under a contract of guaranty for the debts of the tenant, and the contract of guaranty authorized the lender to grant an extension of the tenant's debts without notice to the landowner, and provided that the discontinuance of the guaranty would not affect the guarantor's liability on existing debts, the lender's execution of an FHA nondisturbance agreement not to repossess or in any way disturb the property of the tenant until a specified date, did not discharge the landowner's liability under the contract of guaranty. Brent v. National Bank of Commerce, 258 So. 2d 430 (Miss. 1972).

Benefits under statute discharging sureties unless creditor brings suit within specified time after statutory notice held not waived by contract whereby accommodation sureties waived notice of time extension and also waived necessity for creditor first to exhaust remedies against principal. Warren v. W.T. Raleigh Co., 174 Miss. 603, 165 So. 436 (1936).

Stipulation over accommodation indorser's signature held not waiver of right to discharge from liability on creditor's failure to commence proceedings after notice. First Nat'l Bank v. Rau, 146 Miss. 520, 112 So. 688 (1927).

RESEARCH REFERENCES

ALR. Liability of surety on infant's contract or obligation, where contract is disaffirmed by infant. 44 A.L.R.3d 1417.

Creditor's duty of disclosure to surety or guarantor after inception of suretyship or guaranty. 63 A.L.R.4th 678.

Am Jur. 74 Am. Jur. 2d, Suretyship §§ 59 et seq.

23 Am. Jur. Pl & Pr Forms (Rev) Suretyship Form 65 (answer alleging as defense of surety failure to proceed against principle).

CJS. 72 C.J.S., Principal and Surety §§ 215, 216 et seq.

§ 87-5-3. Surety paying or tendering the debt.

When any person who is bound as surety or indorser for another on any writing, for the payment of money or other thing, which shall remain unpaid, in whole or in part, by the principal debtor, after the maturity thereof, shall pay or tender to the creditor or holder of such writing the amount due thereon, the creditor or holder shall assign such writing to the surety or indorser paying or tendering the money or other thing due; and such assignee may have an action in his own name against the principal debtor upon the writing, to recover the amount paid in satisfaction of it.

SOURCES: Codes, Hutchinson's 1848, ch. 39, art. 1 (10); 1857, ch. 46, art. 3; 1871, § 2259; 1880, § 999; 1892, § 3277; 1906, § 3732; Hemingway's 1917, § 2908; 1930, § 2958; 1942, § 254.

Cross References — Bonds securing public construction contracts and suits thereon, see §§ 31-5-51 et seq.

Remedy of party paying execution, see § 75-13-9.

RESEARCH REFERENCES

Am Jur. 74 Am. Jur. 2d, Suretyship §§ 139 et seq.

§ 87-5-5. Surety company may maintain action against defaulting principal.

When any surety or guaranty company has executed any bond or other contract as surety for any person, company or corporation, guaranteeing the performance of any duty or the payment of any money, and such person, company or corporation make default therein and said surety or guaranty company pays the amount for which the party insured or guaranteed is legally liable, the said surety or guaranty company becomes thereby subrogated to all the rights of the party in whose favor the security or guaranty is given, and such company may have and maintain an action against the principal in its own name to recover the amount paid out in satisfaction thereof.

SOURCES: Codes, 1906, § 3733; Hemingway's 1917, § 2909; 1930, § 2959; 1942, § 255.

Cross References — Legislature's power regarding official bonds, see MS Const Art. 4, § 82.

Bonds securing public construction contracts and suits thereon, see §§ 31-5-51 et seq.

Surety companies generally, see §§ 83-27-1 et seq.

JUDICIAL DECISIONS

1. In general.

In addition to paying a premium, the recipient of an indemnity bond must also prove to the surety company that he has adequate assets to permit recovery of some portion of the loss if the bond is ever called upon since a surety may seek reimbursement from the principal after payment on a bond. First Southwest Corp. v. Lampton, 724 So. 2d 988 (Ct. App. 1998).

General contractor would be granted relief from stay to assert setoff against prepetition obligations to debtor where general contractor was obliged to pay debtor's materialmen on project. Matter of E & D Elec. Co., Inc. (Bkrtcy.S.D.Miss. 1986) 68 B.R. 3

A surety's right of subrogation is unaffected by the filing requirements of the Uniform Commercial Code, since the assignment in a bond application is in aid of an equitable right but does not create that right, and the rights of the surety to subrogation for its losses are founded upon equitable principles independent of any assignment of contract proceeds in the application of the contractor. Travelers Indem. Co. v. Clark, 254 So. 2d 741 (Miss. 1971).

A surety's right to subrogation for amounts paid to materialmen and laborers was not limited to the 10 percent retainage provided for in the construction contract, the contractor's performance of which was guaranteed by the surety, but instead whatever funds were in the hands of the contractor's debtors under such contract at the time of the appointment of a receiver for the contractor should be made available to the surety to the extent necessary to indemnify the surety for losses sustained on the construction project involved. Travelers Indem. Co. v. Clark, 254 So. 2d 741 (Miss. 1971).

In an action against a municipal policeman and the surety upon his official bond for assault upon the plaintiff by the policeman, the trial court did not err in refusing to instruct that the surety company would not be liable for anything unless the policeman was first liable and, if the surety was required to pay any part of the judgment, then the individual defendant would be obligated to reimburse the surety for that amount. Vanderslice v. Shoemake ex rel. Dabbs, 233 Miss. 523, 102 So. 2d 804 (1958).

A surety on a bond, given in pursuance of this statute, is not entitled to claim against the receiver of the insolvent bank the amount which it paid out as interest and attorney's fees in resisting the state's claim on the bond for the amount of the deposit. Union Indem. Co. v. Stevens, 57 F.2d 839 (5th Cir. 1932).

Evidence tending to negative dishonesty or corrupt motives held erroneously excluded in surety's action to recover sum paid on indemnity bond. Seelbinder v. American Sur. Co., 155 Miss. 21, 119 So. 357 (1928).

RESEARCH REFERENCES

Am Jur. 74 Am. Jur. 2d, Suretyship §§ 139 et seq.

23 Am. Jur. Pl & Pr Forms (Rev) Suretyship Forms 4-10 (complaint, petition, or declaration by surety seeking reimbursement from principal).

§ 87-5-7. Surety or indorser, when sued alone, must notify principal and make defense.

A surety or indorser shall not suffer judgment or a decree to be rendered against him by confession or default, without the consent of the principal debtor. And a surety or indorser who shall be sued alone, shall give notice of the suit to the principal debtor, if resident in this state, and if he have knowledge or information of any defense to the action which the principal debtor has, he shall make such defense; and if a surety or indorser, when sued alone, fail to give such notice to the principal debtor, in case he be a resident of this state, or to make such defense in the action of which he has knowledge or information, he shall be barred of all recovery against the principal debtor in case the principal debtor have at the time a good defense to the action of the creditor.

SOURCES: Codes, 1857, ch. 46, art. 4; 1871, § 2260; 1880, § 1000; 1892, § 3278; 1906, § 3734; Hemingway's 1917, § 2910; 1930, § 2960; 1942, § 256.

JUDICIAL DECISIONS

1. In general.

This section is not applicable to an action by a surety against a sheriff to recover on a written contract executed by the sheriff in connection with, and in consideration of, surety's execution as surety of defendant's bond to sheriff. American Sur. Co. v. Inmon, 187 F.2d 784 (5th Cir. 1951).

Statute relating to liability of surety on sheriff's bond held not in conflict with statute relating to recovery against sureties generally. State ex rel. Weems v. United States Fid. & Guar. Co., 157 Miss. 740, 128 So. 503 (1930).

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. Pl & Pr Forms (Rev) Suretyship Form 1 (notice by surety to principal to defendant action).

§ 87-5-9. Surety paying a judgment.

If a judgment or decree be rendered by any court against a principal debtor and his surety, or against his sureties, and one or more of his sureties shall pay and satisfy the judgment or decree, the same shall, by operation of law, be thereby transferred and assigned to the surety or sureties paying and satisfying it, who shall have all the liens and equities of such judgment or decree and of the debt or claim on which the same is founded, which the creditor therein had. The surety, on making affidavit of his suretyship, and of his having paid the judgment or decree, and filing the affidavit and any evidence of such payment that he may hold, with the officer authorized to issue execution on the judgment or decree to whom he may apply for execution, shall be entitled to have execution issued on the judgment or decree, in the name of the plaintiff or complainant against the defendants therein, as if the judgment or decree had not been paid and satisfied. The officer issuing the execution shall indorse thereon that it is issued for the use of the surety who paid the judgment or decree; and the officer serving it shall collect the money, for the use of the surety, from the principal debtor, if he be a party to the judgment or decree and the money can be made out of him; and, if not, he shall collect a ratable proportion of the money from each of the co-sureties.

SOURCES: Codes, Hutchinson's 1848, ch. 39, art. 2 (160); 1857, ch. 46, art. 2; 1871, § 2258; 1880, § 998; 1892, § 3279; 1906, § 3735; Hemingway's 1917, § 2911; 1930, § 2961; 1942, § 257.

Cross References — Enrollment of judgments and satisfaction thereof, see § 11-7-189.

Remedy of party paying execution, see § 75-13-9.

JUDICIAL DECISIONS

1. In general.

A surety is entitled to subrogation as against the receiver to the extent of all claims paid by it pursuant to the obligation of its bonds. New Amsterdam Cas. Co. v. Wood, 213 Miss. 499, 57 So. 2d 141 (1952).

Subrogation is allowed surety only in the event that the corporation or its receiver may have resources on hand after the payment of the claims of the defrauded stockholders. New Amsterdam Cas. Co. v. Wood, 213 Miss. 499, 57 So. 2d 141 (1952).

Execution issued in the name of the complainant in the decree held not invalid so as to authorize injunction restraining sale thereunder although the decree had been paid by a surety, and the execution had not been endorsed that it was issued for the use of the surety. Edwards Bros. v. Bilbo, 138 Miss. 484, 103 So. 209 (1925).

Surety paying a judgment has all the liens and equities therein that the judgment creditor had, both against the principal and other persons against whom the judgment was rendered. Quinn v. Alexander, 125 Miss. 690, 88 So. 170 (1921).

Where a bond was conditioned for the principal's personal superintendence of a building, in an action thereon it was error to exclude evidence of expenditures while the principal was absent. First Baptist Church v. Hendricks, 107 Miss. 267, 65 So. 244 (1914).

Surety on a draft cannot recover of the acceptor more than he was compelled to pay to release himself from a judgment thereon. Wainwright v. Atkins, 104 Miss. 438, 61 So. 454 (1913).

Such surety may recover of the principal debtor the full amount paid in satisfaction of the judgment. Wainwright v. Atkins, 104 Miss. 438, 61 So. 454 (1913).

Sureties on the replevin bond of a claimant of goods under attachment, who are the beneficiaries in a deed of trust made to indemnify them against loss by reason of their suretyship, have no right to enforce the deed of trust until a judgment has been rendered against the claimant and paid by them, and in the absence of such right the attaching creditor cannot be subrogated thereto. Weir-Booger Dry Goods Co. v. Kelly, 80 Miss. 64, 31 So. 808 (1902).

A judgment in replevin against principal and surety on a replevin bond, if rendered after the death of the surety, is absolutely void as to both. Weis v. Aaron, 75 Miss. 138, 21 So. 763, 65 Am. St. R. 594 (1897).

Under this statute, a surety is subrogated to the rights of the judgment-creditor and to nothing more; and the judgment or decree will be barred in his hands at the same time it would have been barred in the hands of the judgment-creditor. Partee v. Mathews, 53 Miss. 140 (1876).

RESEARCH REFERENCES

Am Jur. 73 Am. Jur. 2d, Subrogation §§ 53 et seq.

CJS. 83 C.J.S., Subrogation §§ 67 et seq.

§ 87-5-11. Bona fide purchasers and encumbrancers protected.

If such judgment or decree as is referred to in Section 87-5-9 shall appear to be satisfied, either on the judgment-roll, execution docket, or other record, property conveyed or encumbered thereafter by the principal debtor or sureties to any one for a valuable consideration, without notice of the fact that it was paid and satisfied by a surety, shall not be liable to such judgment or decree, unless at the time the property was conveyed or encumbranced, the record which showed the satisfaction of the judgment or decree, shall also show the fact that it was paid and satisfied by a surety, and the name of such surety.

SOURCES: Codes, 1892, § 3280; 1906, § 3736; Hemingway's 1917, § 2912; 1930, § 2962; 1942, § 258.

Cross References — Conveyances and mortgages being made void if not lodged for record, see § 89-5-3.

JUDICIAL DECISIONS

1. In general.

While under § 87-5-9, mere payment of a judgment by a surety does not release the principal or co-sureties, and execution may issue against them, where a surety who pays a judgment procures the plaintiff to indorse upon the record of the judgment a receipt reciting that it is "in full payment of this judgment and the same is fully satisfied, and she is authorized to do therewith as she sees proper," the judgment cannot afterwards be asserted as against a subsequent bona fide purchaser of lands from the principal debtor. Taylor v. Alliance Trust Co., 71 Miss. 694, 15 So. 121 (1893); Yates v. Mead, 68 Miss. 787, 10 So. 75 (1891).

§ 87-5-13. Execution against principal and sureties; how served.

When execution shall issue on any judgment or decree rendered against a principal and surety, and the surety shall make affidavit that he is only surety on the instrument upon which the judgment or decree is founded, and deliver it to the officer serving the execution, the officer shall make the money, or as much thereof as possible, out of the property of the principal debtor, if he have any in the county to which the execution is issued subject to execution; and the officer shall return the affidavit with the execution.

SOURCES: Codes, Hutchinson's 1848, ch. 39, art. 3 (47); 1857, ch. 46, art. 5; 1871, § 2261; 1880, § 1001; 1892, § 3281; 1906, § 3737; Hemingway's 1917, § 2913; 1930, § 2963; 1942, § 259.

Cross References — How executions are issued and returned, see § 13-3-113.

JUDICIAL DECISIONS

1. In general.

If the fact of suretyship does not so appear, the affidavit of the surety is necessary. Walker v. Gilbert, 21 Miss. (13 S. & M.) 693 (1850); Work v. Harper, 31 Miss. 107 (1856).

When the fact of suretyship appears on the execution in the hands of the officer, the affidavit of the surety is not necessary. Moss v. Agricultural Bank, 12 Miss. (4 S. & M.) 726 (1841).

CHAPTER 7

Improvements to Real Property

Sec.
87-7-1. Repealed.
87-7-3. Payment of contractors; penalty for late payment.
87-7-5. Proportional payment of subcontractors; penalty for late payment.

§ 87-7-1. Repealed.

Repealed by Laws, 1985, ch. 505, § 16, effective from and after January 1, 1986.

[En, Laws, 1985, ch. 335]

Editor's Note — Former Section 87-7-1 provided for payments to subcontractors and suppliers.

§ 87-7-3. Payment of contractors; penalty for late payment.

All sums due contractors under all construction contracts, except public construction contracts, shall be paid as follows:

(a) Partial, progress or interim payments: all partial, progress or interim payments or monies owed contractors shall be paid when due and payable under the terms of the contract. If they are not paid within thirty (30) calendar days from the day they were due and payable, then they shall bear interest from the due date at the rate of one percent (1%) per month until fully paid.

(b) Final payments: The final payment of all monies owed contractors shall be due and payable:

(i) At the completion of the project or after the work has been substantially completed in accordance with the terms and provisions of the contract;

(ii) When the owner beneficially uses or occupies the project except in the case where the project involves renovation or alteration to an existing facility in which the owner maintains beneficial use or occupancy during the course of the project; or

(iii) When the project is certified as having been completed by the architect or engineer authorized to make such certification, whichever event shall first occur.

If the contractor is not paid in full within thirty (30) calendar days from the first occurrence of one (1) of the above-mentioned events, then the final payment shall bear interest from the date of such first occurrence at the rate of one percent (1%) per month until fully paid.

In no event shall the final payment due the contractor be made until the consent of the contractor's surety has been obtained in writing and delivered to the proper contracting authority.

SOURCES: Laws, 1985, ch. 505, § 3; Laws, 2006, ch. 330, § 1, eff from and after July 1, 2006.

JUDICIAL DECISIONS

3. Requirement of a contract with party to be charged.

While plaintiff contractor was entitled to certain legal fees and amounts due under a settlement agreement with defendants, a lessor and lessee of renovated property, its construction contact was only with the lessee and thus, no statutory penalties were available against the lessor under Miss. Code Ann. § 87-7-3. The Stellar Group v. Pilgrim's Pride Corp., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 85242 (S.D. Miss. Nov. 13, 2007).

§ 87-7-5. Proportional payment of subcontractors; penalty for late payment.

When a contractor receives any payment from the owner under a construction contract, other than a public construction contract, the contractor shall, upon receipt of that payment, pay each subcontractor and material supplier in proportion to the percentage of work completed by each such subcontractor and material supplier. If for any reason the contractor receives less than the full payment due from the owner, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount due on the payment. If the contractor without reasonable cause fails to make any payment to his subcontractors and material suppliers within fifteen (15) days after the receipt of payment from the owner under the construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, a penalty in the amount of one-half of one percent (½ of 1%) per day of the delinquency, calculated from the expiration of the fifteen-day period until fully paid. The total penalty shall not exceed fifteen percent (15%) of the outstanding balance due. The provisions of this section shall not be applicable to contracts for the construction of single-family dwellings.

SOURCES: Laws, 1985, ch. 505, § 4; Laws, 2006, ch. 330, § 2, eff from and after July 1, 2006.

CHAPTER 9

General Provisions

Sec.

87-9-1. Manufacturer's taxes required to be paid under contract; alteration of timing; security.

§ 87-9-1. Manufacturer's taxes required to be paid under contract; alteration of timing; security.

(1) When a contract calls for one (1) party to reimburse the other party for the federal manufacturer's excise tax levied by 26 USCA 4081 through 26 USCA 4083, whether as a separate item or as part of the price, the party required to make the reimbursement may tender payment for the taxes one (1) business day before the time that the other party is required to remit the taxes to the United States Internal Revenue Service.

(2) If a party elects to make payment as provided in subsection (1) of this section, the other party may demand security for the payment of the taxes in proportion to the amount the taxes represent compared to the security demanded on the contract as a whole. The other party may not change the other payment terms of the contract without a valid business reason other than the exercise of the option as provided in subsection (1) of this section, except to require the payment of the taxes under the option to be made by electronic transfer of funds.

(3) The party exercising the option set out in subsection (1) of this section shall notify the other party in writing of the intent to exercise the payment option and the effective date of the exercise which shall not be earlier than thirty (30) days after the notice of intent is received or the beginning of the next federal tax quarter, whichever is later.

(4) This section shall apply to all contracts now in effect which have no expiration date and are continuing contracts and to all other contracts entered into or renewed from and after July 1, 1994. Specifically, this section shall apply to contracts arising from daily wholesale price offers which are accepted or rejected by the acceptance or rejection of products at the stated prices. Each daily price offering shall be construed to be a new offer and each purchase of product at a given price offer to create a new contract to which this section shall apply. Any contract in force and effect on July 1, 1994, which, by its own terms, will terminate on a subsequent date, shall be governed by the law as it existed before July 1, 1994.

(5) The option provided for in subsection (1) of this section shall not be construed to impair the obligations arising under any contract executed before July 1, 1994. The exercise of an option as set out in subsection (1) of this section shall not relieve the party of the obligation to make the reimbursement as

provided for in the contract but shall affect only the timing of when that reimbursement shall be tendered.

SOURCES: Laws, 1994, ch. 395, § 1, eff from and after July 1, 1994.

TITLE 89

REAL AND PERSONAL PROPERTY

Chapter 1. Land and Conveyances 89-1-1
Chapter 2. Liability of Recreational Landowners 89-2-1
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CHAPTER 1

Land and Conveyances

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IN GENERAL

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§ 89-1-1. Land conveyed to vest immediately or in future.

Any interest in or claim to land may be conveyed to vest immediately or in the future, by writing signed and delivered; and such writing shall have the effect to transfer, according to its terms, the title of the person signing and delivering it, with all its incidents, as fully and perfectly as if it were transferred by feoffment with livery of seizin, notwithstanding there may be an adverse possession thereof.

SOURCES: Codes, 1857, ch. 36, art. 1; 1871, § 2284; 1880, § 1187; 1892, § 2433; 1906, § 2762; Hemingway's 1917, § 2266; 1930, § 2110; 1942, § 831.

Cross References — Definition of term "land" see § 1-3-25.
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JUDICIAL DECISIONS

1. In general.
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3. Deed in consideration of support.
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1. In general.

In suit to cancel recorded deed, where nondelivery of deed is alleged, the burden of proving nondelivery is on one claiming nondelivery. Wilbourn v. Wilbourn, 204 Miss. 206, 37 So. 2d 256 (1948), error overruled, 204 Miss. 230, 37 So. 2d 775 (1948).

This section [Code 1942, § 831] is applicable to devises by will, as well as to conveyances by deed, since a will is a writing signed under an authorization for delivery upon the happening of the event which is to vest title in the devisee. Ricks v. Merchants Nat'l Bank & Trust Co., 191 Miss. 323, 2 So. 2d 344 (1941).

Statute held to remove all restraints on transfer of real estate. Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930).

This section practically abolishes the doctrine of champerty in reference to lands. Cassedy v. Jackson, 45 Miss. 397 (1871).

2. Character of instrument as deed or will.

A purported conveyance of "all my right, title, interest and claim in and to" described lands, stating that it is understood that the grantor "shall have and hold all her right and title to above described property so long as she shall live, but at her death [grantee] shall claim and hold all right and title", operates as a present conveyance with reservation of a life estate, and is not invalid as an attempted testamentary disposition. Buchanan v. Buchanan, 236 Miss. 751, 112 So. 2d 224 (1959).

An instrument, which was executed and acknowledged in form of a deed and duly delivered and the consideration therefor paid, and which by its plain terms immediately vested the title to the land in the grantee, subject only to the reservation of the right of possession of the grantor as long as he lived, must be given effect as a valid deed. Tanner v. Foreman, 212 Miss. 355, 54 So. 2d 483 (1951).

An instrument in the words and form of, and describing itself as, a deed, acknowledged and recorded as a deed, is a deed and not a will notwithstanding a provision reserving a life estate to grantor and that title should vest in grantee at grantor's death. Watts v. Watts, 198 Miss. 246, 22 So. 2d 625 (1945).

Instrument purporting to convey land to grantee for consideration of $10 and other valuable consideration, providing that grantee was to cultivate the land free of rent, pay the taxes, and support grantor during the remainder of her life, title not to pass until grantor's death, was a "deed" rather than a "will," whereby grantee acquired, during grantor's lifetime, title charged with obligation to support grantor for balance of her life. Hald v. Pearson, 197 Miss. 410, 20 So. 2d 71 (1944).

In determining whether an instrument is a deed or a will, the court must ascertain and give effect to intention of the parties as gathered from entire instrument, in light of circumstances surrounding its execution. Carter v. Dabbs, 196 Miss. 692, 18 So. 2d 747 (1944).

The difference between a deed and a will is that by means of the former a present interest passes, while the latter takes effect only at the death of the testator. Hald v. Pearson, 197 Miss. 410, 20 So. 2d 71 (1944); Watts v. Watts, 198 Miss. 246, 22 So. 2d 625 (1945).

Instruments labeled warranty deeds, containing operative words of conveyance usual to warranty deeds, whereby grantors, who intended to execute deeds, purported to convey land in fee simple reserving to themselves a house and the use of pasture and ten acres, were deeds and not wills, notwithstanding provision, following grantee's promise to pay specified annual amounts to grantors until their deaths, that at that time the property is to be the grantee's, where instruments also provided that if grantee failed to make full annual payments the "deeds" are null and void. Carter v. Dabbs, 196 Miss. 692, 18 So. 2d 747 (1944).

Instrument conveying land, postponing possession and use of land by grantee until grantor's death, was valid deed and not a will. Graham v. Triplett, 148 Miss. 299, 114 So. 621 (1927).

Instrument granting all property that grantor might die seized and possessed of, with provision that grantee pay certain sums to relatives held a will and not a deed. Martin v. Graham, 114 Miss. 653, 75 So. 447 (1917).

Estimate in form of deed held to be deed and not will, though using words "I will this property." Brinson v. Sandifer, 90 Miss. 41, 42 So. 89 (1906).

3. Deed in consideration of support.

Deed for support of grantor not cancelled for breach of agreement where it provides no lien, nor forfeiture on condition broken; such deed not set aside on ground grantor did not understand terms, in absence of timely application. Wynn v. Kendall, 122 Miss. 809, 85 So. 85 (1920).

Deed in consideration of support of grantor not cancelled for failure to perform agreement where it contained no provision for forfeiture and reserved no liens to secure performance. Lowrey v. Lowrey, 111 Miss. 153, 71 So. 309 (1916).

4. Conveyance of future interest.

This statute removes all restraints on the inter vivos transfer of interests in real estate whether present or future. Hemphill v. Mississippi State Hwy. Comm'n, 245 Miss. 33, 145 So. 2d 455 (1962).

This statute makes good as a deed a conveyance of a future interest. Buchanan v. Buchanan, 236 Miss. 751, 112 So. 2d 224 (1959).

Where a testatrix devised to her two daughters a life interest in certain real estate with the remainder over to their descendants, bequeathed one dollar each to her other children, and devised to the same two daughters the rest of her estate both real and personal, the two daughters having no children, took a fee to the realty. Oliphant v. Skelton, 230 Miss. 518, 93 So. 2d 181 (1957).

A conveyance of a life estate by the holder thereof to the remaindermen named in the deed to the grantor is valid. Ricks v. Riddell, 200 Miss. 122, 26 So. 2d 782 (1946).

Conveyance of remainder reserving life estate in grantors held valid. Stubblefield v. Haywood, 123 Miss. 480, 86 So. 295 (1920).

5. Conveyance to take effect in future.

Instrument executed by owner and wife purporting to convey land to son, containing provision that "this deed of conveyance is not to be delivered, or so considered delivered during" the lives of the grantors, but death of both shall constitute a full and complete delivery, and the land shall immediately vest in fee simple in him, was testamentary in character and ineffective as a deed; and the surviving grantor and widow of the owner could not effectively make a delivery upon her deathbed, as she was without power to amend the intention and purpose of her deceased husband. Palmer v. Riggs, 197 Miss. 256, 19 So. 2d 807 (1944).

Conveyances by instruments to take effect at maker's death are not within rule that conveyances may be made to vest in future, since instruments conveying interests to vest in future must take effect in praesenti, and maker must part with all right to thereafter dispose of land otherwise. Tapley v. McManus, 175 Miss. 849, 168 So. 51 (1936).

Instrument in form of deed, not to become effective until death of maker, is testamentary and cannot operate as a deed. Tapley v. McManus, 175 Miss. 849, 168 So. 51 (1936).

In instrument conveying land to take effect after maker's death, habendum clause that grantee should have and hold premises to her, her heirs and assigns forever, did not modify express testamentary provisions so as to convey present interest, but only limited and defined estate granted. Tapley v. McManus, 175 Miss. 849, 168 So. 51 (1936).

Instrument in form of deed, not to become effective until death of maker, cannot operate as a deed, so that maker of such instrument could have it canceled on ground that grantee was attempting to interfere with maker's use and occupation of land. Tapley v. McManus, 175 Miss. 849, 168 So. 51 (1936).

Instrument providing that, in consideration of donee caring for her during life, donor did "bargain, sell, convey and warrant" to him land, but providing transfer not to take effect until death of donor, is not a valid deed. Kelly v. Covington, 119 Miss. 658, 81 So. 485 (1919).

6. Restrictive covenants.

In suit to quiet title to land in which decree involves meaning of restriction in deed against operation on property of textile industry, decree for neither side can rest on testimony of experts in textile trade as to meaning of term "textile industry" when their own disagreement and divergence of understanding of its significance make manifest that phrase is ambiguous and not solvable by uniform trade understanding. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6 (1949).

In suit to quiet title, when phrase in restrictive covenant is shown by expert witnesses to be ambiguous, situation justifies resort to further aid of construction, that of negotiations and conversations leading up to adoption of restrictive covenant. Magnolia Textiles, Inc. v. Gillis, 206 Miss. 797, 41 So. 2d 6 (1949).

Provision in deed to school trustees that in case land ceased to be used as school property land was to revert back to grantor became effective when trustees abandoned building on land, transferred pupils to another consolidated school, enlarged its facilities through successive bond issues and serviced pupils of old school district by busses from new school, and heirs of grantor took possession of property, destroyed buildings without objection by trustees, placed land upon tax rolls and asserted dominion over land. James v. Gulf Ref. Co., 206 Miss. 781, 41 So. 2d 2 (1949).

Restrictions intended to limit the use of property to a particular purpose should be clearly defined and understood by the parties. Frederic v. Merchants & Marine Bank, 200 Miss. 755, 28 So. 2d 843 (1947).

A resolution in the minutes of the board of directors of a grantor bank which recited that the proposed grantee explained that land would be used for a specified purpose, even if such recitals had been contained in the deed of conveyance, did not impose an enforceable restriction on the use of the property. Frederic v. Merchants & Marine Bank, 200 Miss. 755, 28 So. 2d 843 (1947).

Where grantors conveyed property to be held by grantee as long as it should be used for waterworks purposes, and later delivered deed to another, city claiming under both deeds owned fee simple title. Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930).

Intent to subject estates to restrictions on alienation or encumbrance or liability for life tenant's debts must be clearly expressed. Montroy v. Phillips, 134 Miss. 345, 98 So. 775 (1924).

7. Reservations and exceptions.

A reservation in a deed whereby the grantors purported to retain a reversionary interest in minerals was ambiguous and would be construed against the grantors where the grantors did not own a reversionary interest, but owned only a remainder in the mineral interest. Deason v. Cox, 527 So. 2d 624 (Miss. 1988).

Grantee who accepts deed containing reservation or exception of all minerals in lands conveyed with full knowledge of language and import of deed cannot obtain reformation of deed to eliminate reservation, despite his dissatisfaction and protestations at time of its execution. Holland v. Bass, 45 So. 2d 743 (Miss. 1950).

Reservation in deed of all minerals made part of consideration is not inconsistent with status of deed as being cast in warranty form. Holland v. Bass, 45 So. 2d 743 (Miss. 1950).

Provision in deed reserving life estate to grantor and providing that title should vest in grantee at grantor's death does not postpone vesting of title until death of grantor but passes an immediate interest or right, with full enjoyment thereof, postponed until grantor's death. Watts v. Watts, 198 Miss. 246, 22 So. 2d 625 (1945).

Reservation of an undivided one-fourth interest in all minerals, oil and gas "that might hereafter be discovered on the lands herein described," reserved to grantor and its assignees a present, undivided one-fourth interest in the minerals that might be found in the land, as tenants in common of the grantee, with the right, by necessary implication from the reservation itself, to enter upon the land to ascertain the presence of and remove minerals that might lie therein. McNeese

v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945).

In order for a reservation in a deed to be operative it must withhold from the grant something which would have passed by the deed but for the reservation. Barataria Canning Co. v. Ott, 84 Miss. 737, 37 So. 121 (1904).

If there is a patent ambiguity in the description of land excepted from a conveyance, the exception, not the deed, is void for uncertainty. McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1894).

8. Vesting of title in grantee—generally.

Decedent's transfer of land to herself as trustee for the benefit of her four children and the heirs at law of any of such children who should die during the continuance of the trust, with provision for distribution of the trust to the beneficiaries upon the death of the trustee or her termination of the trust, vested the property in the trustee and beneficiaries so that trust property was not part of decedent's gross estate so as to be subject to federal estate taxes. Hays' Estate v. Commissioner, 181 F.2d 169, 39 A.L.R.2d 453 (5th Cir. 1950).

Execution by husband and wife of deed to homestead property to son, delivery of deed to clerk and its recordation, son being overseas in war, vested record and legal title to property in son, which could not be destroyed by destruction of recorded deed by mother. Wilbourn v. Wilbourn, 204 Miss. 206, 37 So. 2d 256 (1948), error overruled, 204 Miss. 230, 37 So. 2d 775 (1948).

One who by his tenant is in actual possession under a deed to a part of a tract of land conveyed to him thereby, there being no adverse possession, is deemed in legal possession of the whole tract conveyed. Houston v. National Mut. Bldg. & Loan Ass'n, 80 Miss. 31, 31 So. 540 (1902); Seals v. Williams, 80 Miss. 234, 31 So. 707 (1902).

9. —Extent of rights acquired.

Deed to property executed by wife conveys only interest in property owned by her, which is an undivided one-half interest when wife owns interest by reason of deed naming husband and wife as grantees, and deletion of husband's name from deed after its delivery to grantees does not increase interest of wife in property. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

Conveyance by cotenant of all his right, title and interest, conveys to grantee merely such right as grantor has in land, usual covenants are restricted to such interest, and grantee becomes substituted for grantor as tenant in common with other tenants. Howard v. Wactor, 41 So. 2d 259 (Miss. 1949).

Deed to railroad of a right-of-way for 200 feet through land of grantor, identifying no particular strip with that certainty which a conveyance of the fee would require, and reserving to grantor rights as to timber and of cultivation, conveyed only a floating easement or right of usage. New Orleans & N.E.R.R. v. Morrison, 203 Miss. 791, 35 So. 2d 68 (1948).

Where an easement will satisfy the purpose of the grant, a fee will not be included in the grant unless expressly provided. New Orleans & N.E.R.R. v. Morrison, 203 Miss. 791, 35 So. 2d 68 (1948).

Where a life estate is created by a deed which provides that the holder shall have a fee-simple title should the remaindermen predecease the life tenant, without issue the life tenant, by virtue of such provision, has an executory interest in the land which is not conveyed in a deed of the life estate from the holder thereof to the remaindermen, and the grantees of the life estate cannot convey a fee-simple title on the strength of such conveyance to them of the life estate. Ricks v. Riddell, 200 Miss. 122, 26 So. 2d 782 (1946).

A deed to a strip of land limiting the grantee's interest to "a private easement or for street purposes only" does not authorize the grantee to take exclusive possession of the land. Lott v. Payne, 82 Miss. 218, 33 So. 948, 100 Am. St. R. 632 (1903).

The grantee in a deed conveying only title to land cannot maintain trespass as assignee of the grantor. Blodgett v. Seals, 78 Miss. 522, 29 So. 852 (1901).

A grantee's covenant to pay a stipulated rent, contained in and constituting the consideration of the deed to him, is binding between the assignee of the covenant and the assignee of the land in fee. Wright v. Hardy, 76 Miss. 524, 24 So. 697 (1899).

A conveyance of land vests in the grantee by way of assignment all rights of action and defense that his grantor had in respect thereto. Fink v. Henderson, 74 Miss. 8, 19 So. 892 (1896).

10. —Priority of other interests.

A grantee in a voluntary conveyance takes subject to all existing equities against his grantor, and cannot afterward acquire the lands at or through a tax sale freed from such equities if the grantor could not have done so. North Am. Trust Co. v. Lanier, 78 Miss. 418, 28 So. 804, 84 Am. St. R. 635 (1900).

A grantee of land takes subject to a prior unrecorded deed from his grantor of which he has actual notice. Henderson v. Cameron, 73 Miss. 843, 20 So. 2 (1896).

11. — —Notice.

A purchaser of land from a life tenant is not entitled to recover from the remainderman, or have a lien on the remainder interest, for the cost of improvements made on the property by him, and equity will not, on the mere ground of the remainderman's silence, relieve one who is perfectly acquainted with his rights, or has the means of becoming so, by examining the land records or otherwise, and the purchaser from the life tenant may not claim the benefit of an estoppel when he does not examine the land records, even if the true owner remains silent at a time when he knows another is about to purchase the land or make improvements thereon. Collier v. King, 251 Miss. 607, 170 So. 2d 632 (1965).

Purchaser of land with notice from public records that owner is dead at the time is charged with constructive notice of whether or not owner left will, if not, who were heirs at law, and whether debts of deceased had been paid. Howard v. Wactor, 41 So. 2d 259 (Miss. 1949).

Mortgagee for value and without notice, not chargeable with unrecorded assignment of lease. Corinth Bank & Trust Co. v. Wallace, 111 Miss. 62, 71 So. 266 (1916).

Deed to land with "party wall agreement and party ownership agreement thereunto appertaining, and easements and tenements," sufficient to put grantee on notice of any such encumbrances. Binder v. Weinberg, 94 Miss. 817, 48 So. 1013 (1909).

12. Effect of grantor's mental state.

The grantees of a deed, who had a fiduciary relationship with the grantor, overcame the presumption of undue influence in the execution of the deed, where the grantor, along with her 3 children, initiated seeking preparation of the deed, the grantor expressed her intent to convey the property to the grantees several weeks prior to the execution of the deed, the attorney who prepared the deed testified that the grantor knew what she was doing when the deed was executed, and the grantor remained in complete control of her finances at all times. Vega v. Estate of Mullen, 583 So. 2d 1259 (Miss. 1991).

Marriage ties alone do not constitute a "confidential relationship" sufficient to raise a presumption of undue influence. Smith v. Smith, 574 So. 2d 644 (Miss. 1990).

The date of execution of the deed should be the critical time when considering the standard of "weakness of intellect" or "great weakness of mind" with respect to the mental capacity to execute a deed. Furthermore, the "before and after" rule, applied in cases of permanent insanity, should not apply in cases involving a "weakness of intellect. Smith v. Smith, 574 So. 2d 644 (Miss. 1990).

There was sufficient evidence to rebut a presumption of undue influence with respect to the conveyance of a farm by a father to his sons where the father was "very sharp" mentally, aware of his family and finances, strong-willed, and, although he lived with one of the grantees at the time of the conveyance, also lived at various times with others and, therefore, was not solely dependant on the grantees. Miner v. Bertasi, 530 So. 2d 168 (Miss. 1988).

The burden of proving lack of mental capacity rests on the party seeking to have the deed of conveyance set aside. Clear and convincing evidence is required to establish lack of mental capacity and the crucial time in such incapacity is when the document is executed. In re Conservatorship of Stevens, 523 So. 2d 319 (Miss. 1988).

In order to be capable of executing deed, grantor must have mentality sufficient to enable him to understand and appreciate the nature and effect of the transaction. Puryear v. Austin, 205 Miss. 590, 39 So. 2d 257 (1949).

Deed of well-educated man signed by mark, shortly before death, at time when blood transfusion was being administered and when grantor was of advanced age, ravaged by disease, weak and irrational, conveying all grantor's property to his brother, without consideration, and including in description in deed land and lease not owned by grantor and about which he made no comment, is entirely void because of grantor's mental incapacity. Puryear v. Austin, 205 Miss. 590, 39 So. 2d 257 (1949).

Deed from mother to two daughters is not presumptively void because of confidential relationship between parties, or because of undue influence, when parties lived in residence together, mother could not speak English and daughters acted as her agents in all her business transactions and acted as her interpreters. Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908 (1949).

13. Delivery and acceptance of deed.

Where a widow assigned and acknowledged a warranty deed conveying her farm to her niece, reserving a life estate to herself, which deed was handed to her brother with the instructions to keep and deliver it to the niece upon the widow's death, which instructions were followed, there was a valid delivery from the widow to the niece in view of the undisputed testimony that the grantor reserved no right to recall the deed, and that the delivery to the brother was unequivocally to hold for the niece. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957).

Grantee manifests acceptance of deed when, upon discovery of recorded deed, he claims property conveyed and takes possession. Wilbourn v. Wilbourn, 204 Miss. 206, 37 So. 2d 256 (1948), error overruled, 204 Miss. 230, 37 So. 2d 775 (1948).

Delivery of deed, after proper execution, to chancery clerk for recording is constructive delivery to grantee when it is apparent either from words or acts of grantor that it is his intention to treat deed as being delivered. Wilbourn v. Wilbourn, 204 Miss. 206, 37 So. 2d 256 (1948), error overruled, 204 Miss. 230, 37 So. 2d 775 (1948).

A valid conveyance presupposes a complete delivery, which does not mean a mere manual possession of the document of conveyance, but a transfer, as by livery of seizin, which constitutes a deliberate present investiture of title. Palmer v. Riggs, 197 Miss. 256, 19 So. 2d 807 (1944).

A deed made to two grantees may be delivered to and accepted by one of them so as to invest him with an undivided interest in the land and yet be ineffectual as to the other for want of a delivery to and acceptance on his part. Chapman v. White Sewing-Mach. Co., 76 Miss. 821, 25 So. 868 (1899).

14. Construction of particular terms.

The wording of a deed which provided that "we hereby bargain, sell, convey and warrant to the Trustees of Oakgrove Consolidated High School and their successors the following described land..." could only connote a conveyance absolute and the grantors' children would not be heard some 50 years later to say that the grantors' intent was something entirely different from what was expressed in the plain and simple legalese in the recorded instrument of conveyance. Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989).

While the trend of the law in the construction of deeds has been extremely strict, and the words of the deed have been paramount in determining the type of conveyance executed rather than the true intent of the grantor, the new trend and interpretation of this rule of law is toward ascertaining the true intent of the grantor when dealing with conveyances by deed, as has been done in construing conveyances by will in this state for almost a hundred years. Avant v. Wells, 244 So. 2d 398 (Miss. 1971).

A deed which recited that the grantor did "hereby warrant, sell and convey" certain land to his wife for a named consideration, but further provided that after the death of the wife, by fee simple, the property be equally divided between two named persons, sufficiently showed that it was the intention of the grantor to convey to his wife a life estate only, and upon her death a remainder to be divided equally between the two named persons. Avant v. Wells, 244 So. 2d 398 (Miss. 1971).

Where the recitals of a deed announce a purpose to invest a life estate in the grantee, with remainder to his children, but the granting party conveys the land in fee simple to the grantee and his heirs, the grant controls. Dunbar v. Aldrich, 79 Miss. 698, 31 So. 341 (1902).

15. Miscellaneous.

In order to have merger of title, it is necessary that first and second deeds of trust be owned entirely by the same party. Merchants Nat'l Bank v. Stewart, 608 So. 2d 1120 (Miss. 1992).

Separate deeds may be used to sever estate in the entirety under narrow range of circumstances whereby both spouses act in concert pursuant to common purpose and without derogation of other's right of survivorship. Thus, separate deeds could be used by husband and wife to sever estate in the entirety where both deeds were executed, acknowledged and recorded at same time and place, and ownership arrangement regarding the property was clearly division of marital property in anticipation of spouses' impending divorce. Newton v. Long, 588 So. 2d 192, 18 A.L.R.5th 980 (Miss. 1991).

An otherwise valid warranty deed would not be set aside for failure of consideration; if there were any failure of consideration, the result would be addressed by awarding damages, rather than a cancellation of the deed. Vega v. Estate of Mullen, 583 So. 2d 1259 (Miss. 1991).

Where land is described in a deed by township, range and section, so that it may be located with absolute certainty, it is of no importance to the validity of the conveyance that the lands or a portion thereof are recited as lying in an incorrect county. Holliman v. Charles L. Cherry & Assocs., 569 So. 2d 1139 (Miss. 1990).

One who relies upon a conveyance by deed is not precluded from claiming adversely possessed land even though the land description in the deed does not include contiguous land adversely possessed by the predecessor in title. Stallings v. Bailey, 558 So. 2d 858 (Miss. 1990).

A deed which conveyed a "2 and one-half/32 and one-half ($^{2f.}/^{5}/_{32\,.5}$)" mineral interest in one land parcel comprising 25 acres and another land parcel comprising 7.5 acres, "containing in the aggregate of 32.5 acres" conveyed a full and undivided 2.5 mineral acres out of the aggregate of 32.5 acres, rather than an undivided $^{2f.}/^{5}/_{32\,.5}$ fractional interest from each acre in the 25-acre track and also from each acre in the 7.5-acre track. Pursue Energy Corp. v. Perkins, 558 So. 2d 349 (Miss. 1990).

If a party who contemplates purchasing a piece of property wishes to protect himself or herself against the possibility that he or she may be unable to secure financing adequate to make the purchase, it is incumbent upon that party to so provide by clear language in the contract. Otherwise, this is a risk the buyer assumes when he or she executes the contract. Osborne v. Bullins, 549 So. 2d 1337 (Miss. 1989).

Although, ordinarily, previous negotiations or contracts are merged into a deed of conveyance, certain preliminary stipulations, such as are independent and collateral, and not such preliminary agreements as would be merged in the conveyance, survive the deed and confer independent causes of action. Knight v. McCain, 531 So. 2d 590 (Miss. 1988).

Where a remainderman affirmatively misled a purchaser from the life tenant into believing that if he purchased the property he would get a good title, and the remainderman thereafter observed the day to day progress of the construction by the purchaser of a home upon the property without any mention of his remainder interest, the purchaser was entitled to a lien for the value of the improvements he had so constructed. Collier v. King, 251 Miss. 607, 170 So. 2d 632 (1965).

Under this section, a residuary devise or bequest carries everything the testator has attempted but failed to dispose of, unless a contrary intention appears from the will. Oliphant v. Skelton, 230 Miss. 518, 93 So. 2d 181 (1957).

One who purchases real property on faith of public records from wife does not occupy position of innocent purchaser for value as to interest of husband when deed conveying property to husband and wife has been altered before recording by deletion of husband's name from deed as one of the grantees. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

Purchaser of property under forgery is not exalted by law into preferred position of innocent purchaser for value and thief can give no title. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

Purchaser of real property who refuses to carry out contract to purchase on other grounds cannot, on appeal from judgment in favor of vendor, raise the objection to form of deed tendered that it required vendee to pay taxes, since grantor did not have opportunity to meet this objection, which he might have corrected had any request been made that he do so. Vanlandingham v. Jenkins, 207 Miss. 882, 43 So. 2d 578 (1949).

Lessor not obligated to put lessee in possession without express provision therefor, as tenant has statutory power to evict an intruder. West v. Kitchell, 109 Miss. 328, 68 So. 469 (1915).

A deed that describes land by section, township and range is not void for uncertainty because it does not describe the state and county in which the land is situated. Ladnier v. Ladnier, 75 Miss. 777, 23 So. 430 (1898).

Unless specially authorized by the terms of the instrument, a trustee in a deed of trust is unauthorized to appoint another to act in his place. Carey v. Fulmer, 74 Miss. 729, 21 So. 752 (1897).

ATTORNEY GENERAL OPINIONS

A tax lien is extinguished once the State acquires property, not necessarily when the deed was recorded. Miller, February 23, 1995, A.G. Op. #95-0039.

RESEARCH REFERENCES

ALR. Conveyance or reservation of minerals as including minerals recoverable only by open pit mining. 1 A.L.R.2d 787.

Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion. 3 A.L.R.2d 466.

Rights as between vendor and vendee under land contract in respect of interest. 25 A.L.R.2d 951.

Deeds: meaning of terms "dwelling" or "dwelling house" or "house" as used in the conveyance or exception or reservation clauses. 38 A.L.R.3d 1419.

Validity and construction or restrictive covenant requiring consent to construction on lot. 40 A.L.R.3d 864.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 A.L.R.3d 920.

Covenant in deed restricting material to be used in building construction. 41 A.L.R.3d 1290.

Applicability of statute of frauds to agreement to rescind contract for sale of land. 42 A.L.R.3d 242.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time. 55 A.L.R.3d 10.

Construction and operation of "optional agreement-flat payment" land contract under which optionee has right to take title when periodic payments (otherwise to be treated as rent) equal agreed price. 55 A.L.R.3d 159.

Independent option to purchase real estate as violating rule against perpetuities or restraints on alienation. 66 A.L.R.3d 1294.

Specificity of description of premises as affecting enforceability of contract to convey real property-modern cases. 73 A.L.R.4th 135.

Effect of Federal Home Mortgage Disclosure Act of 1975 (12 USCS §§ 2801-2809) on enforcement of state disclosure and antiredlining statutes against federal financial institutions. 57 A.L.R. Fed. 322.

Am Jur. 14 Am. Jur. 2d, Champerty and Maintenance §§ 11 et seq.

5A Am. Jur. Pl & Pr Forms (Rev), Champerty and Maintenance, Forms 31, 32 (answer alleging that conveyance was champertous).

8 Am. Jur. Pl & Pr Forms (Rev) Deeds, Forms 14-18 (jury instructions as to what constitutes delivery of deed).

7 Am. Jur. Legal Forms 2d, Deeds §§ 87:231 et seq. (reservations and exceptions).

13 Am. Jur. Proof of Facts 2d 483, Delivery of Deeds.

17 Am. Jur. Proof of Facts 2d 283, Voluntary Grantor's Mistake in Conveying more than was Intended.

38 Am. Jur. Proof of Facts 2d 633, Dedication of Land to Public Use.

CJS. 14 C.J.S., Champerty and Maintenance; Barratry and Related Matters § 16.

26A C.J.S., Deeds §§ 164 et seq.

§ 89-1-3. Land to be conveyed only by writing.

An estate of inheritance or freehold, or for a term of more than one (1) year, in lands shall not be conveyed from one to another unless the conveyance be declared by writing signed and delivered.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (1); 1857, ch. 36, art. 19; 1871, § 2302; 1880, § 1188; 1892, § 2434; 1906, § 2763; Hemingway's 1917, § 2267; 1930, § 2111; 1942, § 832.

Cross References — Definition of term "written," see § 1-3-61.
Operation of decree of chancery court as conveyance, see § 11-5-85.
Land office certificates vesting title in land, see § 13-1-131.
Statutes of frauds, see §§ 15-3-1 et seq., 89-1-47.
Conveyances by attorney in fact, see § 87-3-3.
Requirement that spouse join in conveying homestead, see § 89-1-29.
Requirements for valid conveyance between husband and wife, see § 93-3-9.

JUDICIAL DECISIONS

1. In general.
2. Instrument executed by agent acting under parol authority.
3. Delivery.
4. Miscellaneous.

1. In general.

A severance from a joint tenancy to a tenancy in common is not a conveyance when it arises from the course of dealing, but is simply a change from one form of ownership to that of another form and arises by the operation of law. Bird v. Stein, 102 F. Supp. 399 (S.D. Miss. 1952), rev'd on other grounds, 204 F.2d 122 (5th Cir. 1953), reh'g denied, 205 F.2d 512 (5th Cir. 1953).

No estate in land passed under this section by verbal gift. Smith v. Taylor, 183 Miss. 542, 184 So. 423 (1938).

To establish title by estoppel, evidence must show all necessary elements of estoppel. Roberts v. Bookout, 162 Miss. 676, 139 So. 175 (1932).

Mortgagee for value without notice is not chargeable with unrecorded assignment of lease. Corinth Bank & Trust Co. v. Wallace, 111 Miss. 62, 71 So. 266 (1916).

License to go on land and take turpentine from trees, is not an interest in land requiring writing. Newton v. Long, 107 Miss. 349, 65 So. 460 (1914).

At common law "land," embraced both soil and natural products such as trees growing upon and affixed to it. L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910).

When reasonably possible, conveyances should be so construed as to render them operative. Swan v. New England Mtg. Sec. Co., 75 Miss. 907, 23 So. 627 (1898).

This section forbids a verbal agreement between two adjoining proprietors that a division wall, built in part upon the land of each, shall be the sole property of one of them. Weems v. Mayfield, 75 Miss. 286, 22 So. 892 (1898).

A parol agreement authorizing the cutting of standing trees is within this section. Walton v. Lowrey, 74 Miss. 484, 21 So. 243 (1897).

A license to use land is good only to those in whose favor or for whose use it is given. Agnew v. Jones, 74 Miss. 347, 23 So. 25 (1897).

A verbal lease of land to begin at a future fixed time, and to continue not more than one year, is valid. McCroy v. Toney, 66 Miss. 233, 5 So. 392 (1889).

Real estate cannot be passed or incumbered for a longer period than one year by a mere deposit of the title deeds. Gothard v. Flynn, 25 Miss. 58 (1852).

2. Instrument executed by agent acting under parol authority.

Agent under parol authority may execute written contract binding principal to exchange of lands. Hopper v. McAllum, 87 Miss. 441, 40 So. 2 (1906).

Inasmuch as a lease of land for more than one year must be by deed the appointment of an agent to make it must be by deed. Lobdell v. Mason, 71 Miss. 937, 15 So. 44 (1894).

An instrument executed by an agent who is only verbally authorized purporting to rent land for more than one year is invalid as a lease for the time over one year, but in equity it is good as a contract binding the principal to execute a lease. Lobdell v. Mason, 71 Miss. 937, 15 So. 44 (1894).

3. Delivery.

Where a widow assigned and acknowledged a warranty deed conveying her farm to her niece, reserving a life estate to herself, which deed was handed to her brother with the instructions to keep and deliver it to her niece upon the widow's death, which instructions were followed, there was a valid delivery from the widow to the niece in view of the undisputed testimony that the grantor reserved no right to recall the deed, and that the delivery to the brother was unequivocally to hold for the niece. Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957).

Delivery may be constructive as well as actual, it being sufficient if the words or acts of the grantor manifest his intention to treat the deed as having been delivered. Frederic v. Merchants & Marine Bank, 200 Miss. 755, 28 So. 2d 843 (1947).

Where owner put purchaser in possession of house under oral agreement to sell, and executed but did not deliver deed, there was no change of interest or title. Osler v. Atlas Assurance Co., 127 Miss. 511, 90 So. 185 (1922).

Deposit of deed to be delivered by depository to grantee after grantor's death, if without reservation, is sufficient delivery to vest title. Wilson v. Bridgforth, 108 Miss. 199, 66 So. 524 (1914).

Act of grantor placing deed in tin box among his private papers in wardrobe used by him and wife, did not constitute delivery to wife. Ligon v. Barton, 88 Miss. 135, 40 So. 555 (1906).

If a deed be once effectually delivered, no subsequent acts of the grantor can disparage the title conveyed. Hall v. Waddill, 78 Miss. 16, 27 So. 936 (1900).

To effect a valid delivery of a deed the grantor must part with it so absolutely and irrevocably as never thereafter to have the right to recall it. Hall v. Waddill, 78 Miss. 16, 27 So. 936 (1900).

4. Miscellaneous.

The statutory signing requirements of §§ 15-3-1, 89-1-3, 89-1-29 and 91-9-1 were satisfied with respect to a deed of trust relating to homestead property, even though the wife neglected to sign the deed of trust document, where her signature appeared on the 2 attachments to the deed of trust-the property description and the adjustable rate mortgage rider-which constituted an integral part of the deed of trust. United Miss. Bank v. GMAC Mtg. Co., 615 So. 2d 1174 (Miss. 1993).

The wording of a deed which provided that "we hereby bargain, sell, convey and warrant to the Trustees of Oakgrove Consolidated High School and their successors the following described land ..." could only connote a conveyance absolute and the grantors' children would not be heard some 50 years later to say that the grantors' intent was something entirely different from what was expressed in the plain and simple legalese in the recorded instrument of conveyance. Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989).

A conveyance of land executed to a corporation in violation of the Mississippi Blue Sky Law (Laws, 1916, ch. 97) was utterly void and imparted no notice to subsequent purchasers, nor did it set in motion the running of the 10-year statute of limitations. Mississippi State Hwy. Comm'n v. Smith, 197 So. 2d 212 (Miss. 1967).

Alteration of deed by deletion of name of one of two grantees named in deed when it was delivered does not operate to pass title to grantee whose name remains in deed as title to one-half interest in property which has vested in grantee whose name was deleted can pass only by instrument of writing. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

One who purchases real property on faith of public records from wife does not occupy position of innocent purchaser for value as to interest of husband when deed conveying property to husband and wife has been altered before recording by deletion of husband's name from deed as one of the grantees. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

Deed to property executed by wife conveys only interest in property owned by her, which is an undivided one-half interest when wife owns interest by reason of deed naming husband and wife as grantees, and deletion of husband's name from deed after its delivery to grantees does not increase interest of wife in property. Prater v. Prater, 208 Miss. 59, 43 So. 2d 582 (1949), suggestion of error sustained in part, overruled in part, 208 Miss. 59, 44 So. 2d 538 (1950).

Instrument purporting to be a deed, which has no grantee, either corporation or person, in being is void; deed for school and church purposes to Collins Graveyard and Collins School House was ineffectual, where no corporations so named were known in the community. Morgan v. Collins Sch. House, 160 Miss. 321, 133 So. 675 (1931).

Deed for support of grantor not cancelled for breach of agreement where it provides no lien nor forfeiture on condition broken; such deed not set aside on grounds grantor did not understand terms in absence of timely application. Wynn v. Kendall, 122 Miss. 809, 85 So. 85 (1920).

A deed conveying lands in a legal subdivision described as a corner or fractional corner of the same containing a certain area is not void for uncertainty. Swan v. New England Mtg. Sec. Co., 75 Miss. 907, 23 So. 627 (1898).

A deed conveying "lot 36 in the town of Webb" is not void for uncertainty, since the courts will take judicial notice of the municipal subdivisions of the state and that they are in the counties to which they belong. Wilkerson v. Webb, 75 Miss. 403, 23 So. 180 (1898).

A verbal agreement by the owner to convey land to a county for school purposes, by which third parties are induced to erect a schoolhouse thereon, is an irrevocable license for the purpose for which it was made as long as the house is used for the purpose specified. Agnew v. Jones, 74 Miss. 347, 23 So. 25 (1897).

The section does not prevent the vesting of the title to lands by virtue of an adverse possession for the statutory period, though the holding were begun under a parol gift or purchase. Davis v. Davis, 68 Miss. 478, 10 So. 70 (1891).

RESEARCH REFERENCES

ALR. Rights as between vendor and vendee under land contract in respect of interest. 25 A.L.R.2d 951.

Applicability of statute of frauds to agreement to rescind contract for sale of land. 42 A.L.R.3d 242.

Statute of frauds: validity of lease or sublease subscribed by one of the parties only. 46 A.L.R.3d 619.

Specificity of description of premises as affecting enforceablilty of contract to convey real property-modern cases. 73 A.L.R.4th 135.

Specificity of description of premises as affecting enforceability of lease. 73 A.L.R.4th 236.

Am Jur. 23 Am. Jur. 2d, Deeds §§ 105 et seq.

49 Am. Jur. 2d, Landlord and Tenant §§ 60-64.

38 Am. Jur. Proof of Facts 2d 633, Dedication of Land to Public Use.

CJS. 26A C.J.S., Deeds § 39.

51 C.J.S., Landlord and Tenant §§ 21 et seq.

§ 89-1-5. Words of inheritance not necessary.

Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (23); 1857, ch. 36, art. 2; 1871, § 2285; 1880, § 1189; 1892, § 2435; 1906, § 2764; Hemingway's 1917, § 2268; 1930, § 2112; 1942, § 833.

JUDICIAL DECISIONS

1. In general.
2. Deeds to railroads.

1. In general.

Section 89-1-5, which provides, in part, that "the words deemed necessary by the common law to transfer an estate of inheritance" are no longer necessary to create a fee simple, does not alter the principle that reservations or exceptions expressed in doubtful or ambiguous language are, as a general rule, construed most strongly against the grantor and in favor of the grantee. Deason v. Cox, 527 So. 2d 624 (Miss. 1988).

Under a land sale contract providing for reconveyance to the vendor in the event that industrial facilities were not developed on the property within five years, a condition which was not satisfied, the purchaser was required to convey fee simple title (including timber rights) where, although timber rights had been reserved to the vendor in the original deed and were later conveyed to the purchaser for separate consideration, the rights under the timber deed expired while the property was possessed by the purchaser and thus, merged into the ownership under the original deed. Forbes v. Columbia Pulp & Paper Co., 340 So. 2d 734 (Miss. 1976).

Language in a will that all of the testator's property was to pass to his wife and daughter and their descendents created a fee simple in the wife and daughter and not a life estate. Bradford v. Federal Land Bank, 338 So. 2d 388 (Miss. 1976).

A devise of all testator's property, except a certain parcel, to his wife, was construed to give her the fee notwithstanding an expressed desire that testator's daughter should receive all property that her mother should have at her death. Wheeler v. Williams, 235 Miss. 142, 108 So. 2d 578 (1959).

Under this section decedent's transfer of land to herself as trustee for the benefit of her four children and the heirs at law of any of such children who should die during the continuance of the trust, with provision for distribution of the trust to the beneficiaries upon death of the trustee or her termination of the trust, vested the property in the trustee and the beneficiaries, so that the trust property was not part of decedent's gross estate so as to be subject to federal estate taxes. Hays' Estate v. Commissioner, 181 F.2d 169, 39 A.L.R.2d 453 (5th Cir. 1950).

Devise of land without words of inheritance vests fee-simple title. Strickland v. Delta Inv. Co., 163 Miss. 772, 137 So. 734 (1931).

Devise to two daughters providing that in case of daughters' predeceasing testatrix, their children were to inherit each mother's share, or if one died without children whole estate was to go to other, or if both died without children estate was to go over, was a contingency providing against death of daughters before testatrix, and upon their survival of testatrix they took a fee simple. Nations v. Colonial & U.S. Mtg. Co., 115 Miss. 741, 76 So. 642 (1917).

2. Deeds to railroads.

While Miss. Code Ann. § 89-1-5 contained a presumption that a fee simple title passes unless expressly limited, there also existed a presumption of an easement when a deed failed to specifically identify a tract of land to be used for a railway, and where the railroad's deed gave it a right to enter upon and hold the property, but did not convey the land itself, and the language that the conveyance was against the grantors and their heirs and assigns forever was not in the granting clause, the railroad only had a right of way, and thus, the interest that plaintiff potential purchasers of an industrial plant acquired from the railroad, through a quit claim deed for the property that adjoined the industrial plant, was only a right of way, and the potential purchasers' claim of trespass against defendants, the industrial plant seller and the ultimate buyer, failed on defendants' motion for summary judgment. Fibre Corp. v. GSO Am., Inc., — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37906 (S.D. Miss. Dec. 8, 2005).

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. 2d, Deeds § 23.

CJS. 26A C.J.S., Deeds § 42.

§ 89-1-7. Estate in two or more persons.

All conveyances or devises of land made to two (2) or more persons, including conveyances or devises to husband and wife, shall be construed to create estates in common and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship. But an estate in joint tenancy or entirety with right of survivorship may be created by such conveyance from the owner or owners to himself, themselves or others, or to himself, themselves and others.

An estate in joint tenancy or entirety with right of survivorship between spouses may be terminated by deed of one spouse to the other without necessity of joinder of the grantee spouse and without regard to whether the property constitutes any part of the homestead of the spouses.

SOURCES: Codes, 1857, ch. 36, art. 18; 1871, § 2301; 1880, § 1197; 1892, § 2441; 1906, § 2770; Hemingway's 1917, § 2274; 1930, § 2113; 1942, § 834; Laws, 1958, ch. 237; Laws, 1993, ch. 395, § 1, eff from and after July 1, 1993.

Cross References — Partition of property, see §§ 11-21-1 et seq.
Larceny by cotenant, see § 97-17-63.

JUDICIAL DECISIONS

1. In general.
2. Tenancy in common.
3. Joint tenancy.
4. Tenancy by entirety.
5. Conveyances to trustees.
6. Miscellaneous.

1. In general.

This section does not apply to mortgages or choses in action. Vaughn v. Vaughn, 238 Miss. 342, 118 So. 2d 620 (1960).

The law does not favor joint estates with the right of survivorship. Cross v. O'Cavanagh, 198 Miss. 137, 21 So. 2d 473 (1945).

The statute does not apply to conveyances made before its passage. Gresham v. King, 65 Miss. 387, 4 So. 120 (1888).

2. Tenancy in common.

A reservation or conveyance of a fractional interest in minerals creates a tenancy-in-common between the parties as to the minerals. Thornhill v. System Fuels, Inc., 523 So. 2d 983 (Miss. 1988).

The rule which prevents one tenant in common from purchasing an outstanding title to the common property and setting it up against his cotenant is founded upon a confidential relation which is presumed to exist between them, and has no application where the circumstances surrounding them negative any such relation, and show that they, though in law tenants in common, are not such in fact, and are asserting hostile claims against each other with reference to the common property. Bayless v. Alexander, 245 So. 2d 17 (Miss. 1971).

Where a will provided that two legatees were to take the dividends from certain bank stock for life with the power to sell stock upon agreement among themselves, the remainder to go to two named remaindermen, the relationship created was that of tenancy in common between the legatees, so that upon the death of one legatee his interest would pass to the remaindermen. Birmingham v. Conger, 222 So. 2d 388 (Miss. 1969).

A conveyance to two or more individuals is presumed to create a tenancy in common in the named individuals, absent evidence rebutting such a presumption. Chevron Oil Co. v. Clark, 291 F. Supp. 552 (S.D. Miss. 1968), aff'd in part, rev'd on other grounds, 432 F.2d 280 (5th Cir. 1970).

Where a trustee, who was the owner of a one-half interest in land, and a woman, who was the record owner of a one-half interest of the surface and three-tenths of the minerals in the land, were tenants in common, upon the conveyance by the trustee to a third person of his one-half interest, the third person became a tenant in common with the woman. Anderson v. Boyd, 229 Miss. 596, 91 So. 2d 537 (1956).

Under will devising brother one-sixth, two sisters each one-third, and former wife one-sixth of remainder, their interest was estate in common, and admissions against interest by less than all of them were not admissible in will contest. Nebhan v. Mansour, 162 Miss. 418, 139 So. 166 (1932), suggestion of error overruled, opinion modified, 162 Miss. 418, 139 So. 878 (1932).

Residuary legacy of real estate to two nephews for their lives made nephews tenants in common. Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912).

Conveyance to "Pink Boutwell and wife" created tenancy in common, and husband and wife each owned an undivided one-half interest. Conn v. Boutwell, 101 Miss. 353, 58 So. 105 (1912).

Upon renunciation of will by widow, executors who were residuary legatees became tenants in common with widow and were entitled to partition of the estate. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193 (1908).

Unity of possession only necessary to constitute tenancy in common, regardless of commencement, quantum of interest, or source of title. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193 (1908).

A child in esse at the date of a conveyance to his mother and children, takes as tenant in common with the mother, under this section. Brabham v. Day, 75 Miss. 923, 23 So. 578 (1898).

Conveyance to three nieces for their lives, and at their death to the descendants of their bodies in fee, if any there be, and if they have none to survive them, then to the heirs of their brothers and sisters in fee, created a tenancy in common for the life of the last survivor of the nieces, the heirs of predeceasing tenants in common holding in common with the surviving tenants. Hawkins v. Hawkins, 72 Miss. 749, 18 So. 479 (1895).

A devise to two persons, without other words, makes them tenants in common. Nichols v. Denny, 37 Miss. 59 (1859).

3. Joint tenancy.

A deed conveying property to a husband and wife specifically created a joint tenancy, where it was conveyed to them "as joint tenants, not as tenants in common, but with the rights of survivorship in each upon death of either." Ayers v. Petro, 417 So. 2d 912 (Miss. 1982).

Although joint tenancies are not favored in Mississippi, they may be created by the use of specific language in the deed or other instrument. O'Connor v. Dickerson, 188 So. 2d 241 (Miss. 1966).

Deeds to husband and wife "and the survivor of them" manifested an intention to create an estate in joint tenancy and not an estate in common, entitling the wife to take as survivor as against the heirs at law of her deceased husband. Wolfe v. Wolfe, 207 Miss. 480, 42 So. 2d 438 (1949).

Deed of an undivided four-fifths interest in certain land to two persons "jointly" did not create joint tenancy with right of survivorship. Doran v. Beale, 106 Miss. 305, 63 So. 647 (1913).

4. Tenancy by entirety.

Separate deeds may be used to sever estate in the entirety under narrow range of circumstances whereby both spouses act in concert pursuant to common purpose and without derogation of other's right of survivorship. Thus, separate deeds could be used by husband and wife to sever estate in the entirety where both deeds were executed, acknowledged and recorded at same time and place, and ownership arrangement regarding property was clearly division of marital property in anticipation of spouses' impending divorce. Newton v. Long, 588 So. 2d 192, 18 A.L.R.5th 980 (Miss. 1991).

A tenancy by the entirety with right of survivorship was not converted to a tenancy in common by divorce of the parties; since a tenancy by the entirety is a joint tenancy with a right of survivorship plus the marital relation, even if the divorce terminated the tenancy by the entirety, the parties remained joint tenants with the right of survivorship and, upon the wife's death, the property became the husband's property. Shepherd v. Shepherd, 336 So. 2d 497 (Miss. 1976).

A tenancy by the entireties in real property cannot be severed or destroyed by the act of one of the tenants. Cuevas v. Cuevas, 191 So. 2d 843 (Miss. 1966).

5. Conveyances to trustees.

This section does not preclude the creation of a joint estate in trustees, which on the death of one will vest title in the survivors. King v. O'Tuckolofa Gun & Rod Club, 178 Miss. 606, 174 So. 83 (1937).

The right of survivorship exists where the estate is conveyed to trustees jointly. McAllister v. Plant, 54 Miss. 106 (1876).

6. Miscellaneous.

A deed in which a widower deeded land to himself and to the niece of his deceased wife as an "estate in the entirety with full rights of survivorship and not as tenants in common" was, under other Mississippi decisions and under the law generally, sufficient to vest the entire title to the property in the niece after the widower's death. Welborn v. Henry, 252 So. 2d 779 (Miss. 1971).

Where a cotenant's widow in possession claimed property to the exclusion of the other cotenants for more than 10 years after the death of her husband, who had claimed the entirety of the property, and during such period the widow had received all benefits flowing from the land and had made all expenditures without accounting to anyone, there was the equivalent of an ouster of the other cotenants and she had clear full title by adverse possession, the fiduciary relationship usually presumed to exist between cotenants having no application here; since the circumstances surrounding the widow's acquisition of title completely negated any such relation to the extent that it was the equivalent of an ouster of the other cotenants. Bayless v. Alexander, 245 So. 2d 17 (Miss. 1971).

In an action brought by cotenants to confirm and establish their title to an undivided interest as cotenants in certain land as against claims of another cotenant, who had purchased a tax title to the property, the purchasing cotenant could not claim adverse possession as against her cotenants where there was no ouster of the cotenants such as would give them notice that her claim was adverse to their interest. Gavin v. Hosey, 230 So. 2d 570 (Miss. 1970).

The purchase of an outstanding tax title to the common property by one cotenant inures to the benefit of all cotenants, the reason being the confidential relationship or position of trust presumed to exist between cotenants. Gavin v. Hosey, 230 So. 2d 570 (Miss. 1970).

Where a grant or devise is made to one and his children, or issue, or the children of issue of his body, or equivalent words, and the named person has no child at the effective date of the instrument, the named person takes a fee simple title to the property conveyed or devised, unless the instrument, by express words or necessary implication, shows a clear intent to create a life estate in the named person, remainder to afterborn children or issue. Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 161 A.L.R. 606 (1945).

A conveyance of realty, effective immediately, to the grantors' daughter, "and the children of her body," reserving a life estate to one of the grantors, does not, where there are no children in being on the effective date of the grant, give the daughter's children an interest as tenants in common or joint tenants with their mother. Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 161 A.L.R. 606 (1945).

Under will bequeathing estate to three living sisters and the heirs of deceased sister, and providing that at the death of the living sisters what was left of the estate was to go to the heirs of the deceased sister, the heirs are entitled to possession of each sister's share upon her death, rather than upon the death of the last survivor of them. Cross v. O'Cavanagh, 198 Miss. 137, 21 So. 2d 473 (1945).

RESEARCH REFERENCES

ALR. Creation of right of survivorship by instrument ineffective to create estate by entireties or joint tenancy. 1 A.L.R.2d 247.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as a fraud upon creditors. 7 A.L.R.2d 1104.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency. 7 A.L.R.2d 1317.

Validity and effect of conveyance by one spouse to other of grantor's interest in property held as estate by entireties. 8 A.L.R.2d 634.

Rights and remedies as between cotenants of cemetery lots respecting burials therein. 10 A.L.R.2d 219.

Retrospective operation of legislation affecting estates by the entireties. 27 A.L.R.2d 868.

Character of tenancy created by owner's conveyance to himself and another, or to another alone, of an undivided interest. 44 A.L.R.2d 595.

Estate by entireties as affected by statute declaring nature of tenancy under grant or devise to two or more persons. 32 A.L.R.3d 570.

Felonious killing of one cotenant or tenant by the entireties by the other as affecting latter's rights in the property. 42 A.L.R.3d 1116.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse. 52 A.L.R.3d 753.

Estate created by deed to persons described as husband and wife but not legally married. 9 A.L.R.4th 1189.

Am Jur. 20 Am. Jur. 2d, Cotenancy and Joint Ownership §§ 11-15, 28-31.

7 Am. Jur. Legal Forms 2d, Cotenancy and Joint Ownership §§ 75:51 et seq. (tenancy in common).

12 Am. Jur. Legal Forms 2d, Life Tenants and Remaindermen §§ 166:9 et seq.

(creation of life estates and future interests).

20 Am. Jur. Proof of Facts 2d 321, Status of Property as Separate.

Young, Trial Handbook for Mississippi Lawyers § 19:15.

CJS. 86 C.J.S., Tenancy in Common §§ 7 et seq.

§ 89-1-9. The rule in Shelley's Case abolished.

A conveyance or devise of land or other property to any person for life, with remainder to his heirs or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs or heirs of his body, who shall take as purchasers, by virtue of the remainder so limited to them.

SOURCES: Codes, 1880, § 1201; 1892, § 2446; 1906, § 2776; Hemingway's 1917, § 2280; 1930, 2114; 1942, § 835.

Cross References — Descent of land generally, see § 91-1-3.

JUDICIAL DECISIONS

1. In general.

Where a will devised one-half of a parcel of land to the testator's son for life, and then to the heirs of the body of the son in fee simple, the testator intended to devise a life estate to the son, with remainder after his death to the heirs of his body in fee simple, should he have such heirs, and, upon the son dying without heirs, the devise lapsed and reverted to the heirs of the testator. Boxley v. Jackson, 191 Miss. 134, 2 So. 2d 160 (1941).

The rule in Shelley's Case was abolished by this section. Boxley v. Jackson, 191 Miss. 134, 2 So. 2d 160 (1941).

The grantor may impose restrictions on alienation of land during the period of life of up to two persons. Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937).

Where deed conveyed land to grantee for life and provided that on grantee's death land should become property of grantee's legal heirs and prohibited grantee from selling, mortgaging, or otherwise incumbering land, the restrictions on the alienation were valid. Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937).

Will devising land to testator's son for life and then to son's bodily heirs held effective to make life tenant's children remaindermen in fee, notwithstanding statute limiting suspension of alienation where subsequent provisions in will were dependent on contingencies which did not in fact occur. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935), adhered to, 175 Miss. 131, 166 So. 345 (1936).

Devise for life with remainder to heirs or heirs of body creates estate for life with remainder in fee. Stigler v. Shurlds, 131 Miss. 648, 95 So. 635 (1923).

This section and Shelley's Case held not to apply to conveyance to woman and heirs of her body, such not being grant to her for life with remainder to heirs of her body. Liberty Bank v. Wilson, 116 Miss. 377, 77 So. 145 (1918).

Whether provision in deed was a gift over of the land in case of death of grantor without heirs, held not to be determined until event happens and person taking thereunder is before court. Liberty Bank v. Wilson, 116 Miss. 377, 77 So. 145 (1918).

Devise to two daughters providing that in case of daughters' deaths their children were to inherit their shares, or if one died without children whole estate was to go to other, or if both died without children estate was to go over, was a contingency providing against death of daughters before testatrix and upon their survival of testatrix they took a fee simple. Nations v. Colonial & U.S. Mtg. Co., 115 Miss. 741, 76 So. 642 (1917).

RESEARCH REFERENCES

ALR. Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder. 16 A.L.R.2d 691.

Nontrust life estate expressly given for support and maintenance, as limited thereto. 26 A.L.R.2d 1207.

Timber rights of life tenant. 51 A.L.R.2d 1374.

Modern status of the rule in Shelley's Case. 99 A.L.R.2d 1161.

Duty as between life tenant and remainderman with respect to cost of improvements or repairs made under compulsion of governmental authority. 43 A.L.R.4th 1012.

Am Jur. 23 Am. Jur. 2d, Deeds § 186.

28 Am. Jur. 2d, Estates §§ 102 et seq.

CJS. 26A C.J.S., Deeds §§ 248 et seq.

§ 89-1-11. Remainder good without particular estate.

When an estate is, by any conveyance, limited in remainder to the son or daughter of any person, to be begotten such son or daughter born after the decease of the father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (27); 1857, ch. 36, art. 9; 1871, § 2292; 1880, § 1202; 1892, § 2447; 1906, § 2777; Hemingway's 1917, § 2281; 1930, § 2115; 1942, § 836.

RESEARCH REFERENCES

Am Jur. 28 Am. Jur. 2d, Estates § 211.

CJS. 31 C.J.S., Estates §§ 94 et seq.

§ 89-1-13. Limitation on failure of issue.

Every contingent limitation in any conveyance or will made to depend upon the dying of any person without heirs or heirs of the body, or without issue or issue of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted as a limitation, to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten (10) months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the instrument creating it.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (26); 1857, ch. 36, art. 8; 1871, § 2291; 1880, § 1203; 1892, § 2448; 1906, § 2778; Hemingway's 1917, § 2282; 1930, § 2116; 1942, § 837.

Cross References — Wills generally, see §§ 91-5-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Construction and application.

1. In general.

The purpose of this section is to make the test whether the person in question left issue surviving him at the time of his death or had issue born to him within ten months thereafter, instead of whether or not he may have at any time subsequent to the execution of a will in his favor have had issue which predeceased such a beneficiary. Hays v. Cole, 221 Miss. 459, 73 So. 2d 258 (1954).

This section applies to the situation at common law where there would be construed to exist an indefinite failure of issue and thus a void fee tail estate. White v. Inman, 212 Miss. 237, 54 So. 2d 375, 30 A.L.R.2d 380 (1951).

The statute fixes the period at which the contingent limitation is to take effect. Sims v. Conger, 39 Miss. 231, 77 Am. Dec. 671 (1860).

The statute was designed to give to certain words a meaning different from that before attached to them by the courts. Hampton v. Rather, 30 Miss. 193 (1855); Jordan v. Roach, 32 Miss. 481 (1856); Busby v. Rhodes, 58 Miss. 237 (1880).

2. Construction and application.

Quitclaim deed executed to each other by four devisees of tract of land, each devisee having defeasible fee simple title, by which tract was divided into four parcels and each devisee took possession of his or her allotted parcel, served to separate use and income of divided parcels but could not confer upon respective grantees fee simple title to parcels as division was made subject to, and could not change, terms of will under which devisees took defeasible fee simple title. Crump v. Phelps, 207 Miss. 682, 43 So. 2d 105 (1949).

Defeasible fee simple title is vested in named devisees under will providing trust for benefit of four named devisees and survivor or survivors of them and issue of deceased devisees subject to restriction that in event of death of devisee having no issue, devisee's share is to be equally divided between surviving devisees and issue of those who may have died, issue to take by representation interest of deceased parent, and this interpretation of will is supported by this section against contention that executory limitation over could not become effective unless death of one of children of testatrix occurred prior to her death. Crump v. Phelps, 207 Miss. 682, 43 So. 2d 105 (1949).

Statute providing that contingent limitation in will depending on the dying of any person without issue, or issue of the body, or without children, shall be interpreted as limitation to take effect when such person shall die not having such heir, or issue, or child, has reference to death of devisee or legatee, and in absence of contrary intention expressly declared on face of will, requires that the limitation over be interpreted as taking effect on death of one of devisees without issue at any time. Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

Limitation over contained in provision in will that if any of children to whom testatrix left certain realty should die without children, his or her share in realty should go equally to testatrix' children that were living, was intended to take effect on death of child without issue at any time, whether before or after death of testatrix, and hence children took fee defeasible on their deaths without issue, leaving one or more of the other children surviving them. Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

Will executed in 1929 by testatrix dying in 1929, and providing that if any of children to whom testatrix left certain realty should die without children, his or her share in such realty should go equally to testatrix' children that were living, held not violative of rule against perpetuities or the two-donee statute, as respects interest passing on death of one child in 1933 without issue. Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937).

As to share given directly to testator's daughter, two-donee statute as it read in 1871 did not affect right of testator's sisters and brothers nor their descendants from taking as purchasers under will. Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932).

Devise to two daughters providing that in case of daughters predeceasing testatrix their children to inherit each daughter's share, or if one died without children whole estate to go to other, or if both died without children estate to go over, contingency provided against was death of daughters before testatrix and upon their survival of testatrix they took a fee simple. Nations v. Colonial & U.S. Mtg. Co., 115 Miss. 741, 76 So. 642 (1917).

The statute will not be construed to add the words "then living" to a limitation to the descendants of the donee of a life interest. Caldwell v. Willis, 57 Miss. 555 (1880).

In a devise to the son for life, and, after his death, to his lineal descendants, to the remotest posterity, and, in case of failure of lineal descendants, to the heirs of the devisor, the limitation over is void. Powell v. Brandon, 24 Miss. 343 (1852).

In a devise to the daughter and the heirs of her body, but, if she die without issue, then to the children of the devisor alive at her death, the limitation over is valid. Kirby v. Calhoun, 16 Miss. (8 S. & M.) 462 (1847).

RESEARCH REFERENCES

ALR. Nontrust life estate expressly given for support and maintenance, as limited thereto. 26 A.L.R.2d 1207.

Timber rights of life tenant. 51 A.L.R.2d 1374.

Modern status of the rule in Shelley's Case. 99 A.L.R.2d 1161.

Am Jur. 28 Am. Jur. 2d, Estates §§ 363 et seq.

CJS. 31 C.J.S., Estates § 144.

§ 89-1-15. Estates in fee tail prohibited.

Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (24); 1857, ch. 36, art. 3; 1871, § 2286; 1880, § 1190; 1892, § 2436; 1906, § 2765; Hemingway's 1917, § 2269; 1930, § 2117; 1942, § 838.

JUDICIAL DECISIONS

1. In general.
2. Construction of terms.
3. Restraints on alienation.
4. Validity of devise—generally.
5. —Partial validity.
6. —Under rule against perpetuities.
7. Resulting estates—generally.
8. —Fee simple.
9. —Life estate.
10. Miscellaneous.

1. In general.

The underlying purposes accomplished by the rule against perpetuities and the rule against restraints on alienation are the same. Patterson v. Patterson, 193 So. 2d 575 (Miss. 1967).

This section; prohibiting estates in fee tail does not by its terms abrogate the common law rule that disabling restraints upon the alienation of a legal life estate or fee are void. Patterson v. Patterson, 193 So. 2d 575 (Miss. 1967).

This statute deals only with conveyances or devises of lands, and is not applicable to personal property. Magee v. Magee's Estate, 236 Miss. 572, 111 So. 2d 394 (1959).

This section not applicable to personalty. Thomas v. Thomas, 97 Miss. 697, 53 So. 630 (1910).

2. Construction of terms.

A will devising testatrix's real estate equally to a son and two daughters in common, and providing that if one of the devisees should die without leaving bodily heirs his or her share should go to the survivors, or if two of them should die without bodily heirs the land should go to the survivor, and that if either of the three devisees should die leaving bodily heirs, the heirs were to take the deceased parent's share, violated the former "two donees" provision of this section (Code 1892, § 2436) permitting a devise of lands to a succession of donees then living not exceeding two and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple, so that under the will the three devisees named as first takers took a determinable fee simple, subject to be defeated as to each share by the death of the devisee without bodily heirs, and upon the death of the two devisees named as first takers the entire estate finally vested in fee simple in the remaining devisee. Carter v. Sunray Mid-Continent Oil Co., 231 Miss. 8, 94 So. 2d 624 (1957).

Under a conveyance to the grantors' daughter "and the children of her body," reserving a life estate to one of the grantors, the daughter, having no children at the time of the conveyance, takes a fee tail, which by this section [Code 1942, § 838] is converted into a fee simple. Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 161 A.L.R. 606 (1945).

Where a grant or devise is made to one and his children, or issue, or the children or issue of his body, or equivalent words, and the named person has no child at the effective date of the instrument, the named person takes a fee simple title to the property conveyed or devised, unless the instrument, by express words or necessary implication, shows a clear intent to create a life estate in the named person, remainder to after-born children or issue. Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 161 A.L.R. 606 (1945).

An intent on the part of the grantors of realty to an only daughter "and the children of her body," to convey a life estate to the daughter with remainder to her children may not be inferred where, at the time of the conveyance, which was in consideration of love and affection, the daughter was only 16 years of age and unmarried, so that it was problematical whether she would ever have children. Ewing v. Ewing, 198 Miss. 304, 22 So. 2d 225, 161 A.L.R. 606 (1945).

Where a will devised one-half of a parcel of land to the testator's son for life, and then to the heirs of the body of the son in fee simple, the testator intended to devise a life estate to the son, with remainder after his death to the heirs of his body in fee simple, should he have such heirs, and, upon the son dying without heirs, the devise lapsed and reverted to the heirs of the testator. Boxley v. Jackson, 191 Miss. 134, 2 So. 2d 160 (1941).

A former enactment of this statute; while permitting contingent ultimate limitations to the right heirs of the donor either generally or specifically, was construed as not changing the common law rule that a conveyance to one's own right heirs, like a deed without a grantee is void, and that when right heirs are designated as a class as such limitees, they take by descent and not by purchase, but when they are named specifically as individuals, they take by purchase and not by descent. West Tennessee Co. v. Townes, 52 F.2d 764 (N.D. Miss. 1931).

Gift to son in trust for donor's children to farm lands during trust period and divide property, was donation to class, not violation of two-donee statute. Shannon v. Riley, 153 Miss. 815, 121 So. 808, 75 A.L.R. 768 (1929).

Deed of property to one for life with remainder to children in fee, not an attempt to create estate in violation of this section. Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

Where death of persons is dealt with as uncertain event it is presumed that death at a particular time or under particular circumstances is meant, and where circumstances do not appear it is presumed death is to occur prior to death of devisee before vesting in him of the property in possession; holding otherwise would render devise void for uncertainty. Bibby v. Broome, 116 Miss. 70, 76 So. 835 (1917), error overruled, 116 Miss. 77, 76 So. 842 (1918).

Bequest for use of sons for life, then each father's part to his children, to be theirs when they reach 21 years, providing if any died before age or condition fulfilled without brothers or sisters his share should go to surviving grandchildren of testatrix of proper age on condition fulfilled, created an executory devise and not an "estate tail." Thomas v. Thomas, 97 Miss. 697, 53 So. 630 (1910).

Where there was a devise to wife and children for their natural lives, and to children and heirs of their bodies if there should be any at the time of their death, and if not, to revert to the estate in gross and be again divided between testator's wife and children and to their heirs, "they" to take a life estate only, and the grandchildren were to take only such share as their deceased parent would have taken, the word "they" should be construed to refer to children of the testator and not to any surviving grandchild, in view of the dominant purpose of the will to vest a life estate in the testator's wife and children and remainder in fee to his grandchildren. Davenport v. Collins, 96 Miss. 716, 51 So. 449 (1910).

3. Restraints on alienation.

Restraints on alienation during the lifetime of a life tenant are valid. Patterson v. Patterson, 193 So. 2d 575 (Miss. 1967).

Where will established a life estate in certain real property for one life tenant and prohibited sale of property until grandchildren remaindermen were 45 years of age, there resulted a restraint on alienation in excess of that permitted by this section. Patterson v. Patterson, 193 So. 2d 575 (Miss. 1967).

Clause in will prohibiting partition during life of widow, first life tenant, and of children, second life tenant, precludes partition during such period. Ford v. Smith, 162 Miss. 138, 137 So. 482 (1931).

Testator may prevent alienation of property during period restrictions may be made under two-donee statute. Ford v. Smith, 162 Miss. 138, 137 So. 482 (1931).

Devise in fee prohibiting alienation until 1975, with absolute devise over on death of first taker before such date, conveyed life estate subject to be converted into fee. Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

Prohibition against alienation during life of first devisee is legal. Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

Testator may prohibit alienation of life estate devised. Crawford v. Solomon, 131 Miss. 792, 95 So. 686 (1923).

Where alienation not prohibited in will or deed, chancery court may sell land of minor for reinvestment, where interest is remainder. Crawford v. Solomon, 131 Miss. 792, 95 So. 686 (1923).

4. Validity of devise—generally.

Provision limiting devise to 3 sisters and 2 brothers in case of death without descendants held invalid. Norfleet v. Norfleet, 151 Miss. 790, 119 So. 306 (1928).

Devise of land to succession of donees, three in number, is void. Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925).

This section not violated where possible for remainder in fee to vest upon death of first life tenant. Stigler v. Shurlds, 131 Miss. 648, 95 So. 635 (1923).

Principle that will may be sustained by dropping void ulterior limitation, not applicable where provision cannot be separated without interfering with manifest purpose of testator. Gully v. Neville, 55 So. 289 (Miss. 1911).

5. —Partial validity.

Although restraint upon alienation of a life estate until remaindermen thereof became 45 years of age was in excess of that permitted by this section, court applied doctrine of approximation and adjudicated the restraint valid during the life of the life tenant, and invalid thereafter. Patterson v. Patterson, 193 So. 2d 575 (Miss. 1967).

Portions of will which violate statute limiting suspension of alienation are rejected and valid portions are enforced, if enforcement is practicably possible and will not defeat dominant purpose of will. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935), adhered to, 175 Miss. 131, 166 So. 345 (1936).

Void ulterior limitations on estate will not void whole provision if first can be lawfully separated; will, if possible, will be sustained in so far as it does not offend against two-donee statute. Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

Deed containing ulterior limitees held valid up to point where statute violated. Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

6. —Under rule against perpetuities.

Mississippi follows the "wait and see" doctrine with respect to the rule against perpetuities under which the future interest in question is held valid if the required contingency actually happens during the perpetuities period, even though the interest was not good at its creation because it was possible for the required contingency to happen outside the perpetuities period. C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526 (Miss. 1988).

This section was inapplicable to a case where the court was called upon to determine whether the rule against perpetuities was violated by the provisions of a will leaving the bulk of testator's estate in trust which was to terminate when testator's youngest grandchild (whether living at the time of the execution of the will or thereafter born) became 25 years of age, but further providing that in no event should the trust continue for a longer period than 35 years from the date of the will. Carter v. Berry, 243 Miss. 356, 140 So. 2d 843, 95 A.L.R.2d 791 (1962).

Court will construe ambiguous will, if reasonably possible, to render it valid under rule against perpetuities or two-donee statute. Bratton v. Graham, 146 Miss. 246, 111 So. 353 (1927).

Where gift is invalid in part because of rule against perpetuities, separable parts violating rule may be rejected and rest upheld. Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

7. Resulting estates—generally.

Joint will operates as separate will of each; joint will of wife and second husband providing survivor to have property while unmarried, otherwise to go to all heirs, but if neither should marry at their death property to be divided between their heirs, wife intended to give husband life estate if he did not remarry with equal division among all her children by both husbands and their descendants, at his death. Hill v. Godwin, 120 Miss. 83, 81 So. 790 (1919).

Devise for life with remainder to testator's heirs, vested remainder in living heirs at testator's death. Schlater v. Lee, 117 Miss. 701, 78 So. 700 (1918).

Sons of donor held to take at his death a possibility coupled with an interest which they could convey. Alexander v. Richardson, 106 Miss. 517, 64 So. 217 (1914).

8. —Fee simple.

Devise to A and heirs of his body is devise in fee simple. Bolton v. Barnett, 131 Miss. 802, 95 So. 721 (1923).

Devise to son and daughter and heirs to be held, used, occupied and enjoyed in common until "my youngest grandchild now living or that may come into existence hereafter shall have reached the years of 21," gave son fee simple subject only to limitation, if any as to joint use, possession, etc. Fairchild v. Harbinson, 120 Miss. 236, 82 So. 73 (1919).

Conveyance to woman and heirs of her body was conveyance in fee simple. Liberty Bank v. Wilson, 116 Miss. 377, 77 So. 145 (1918).

Devise to two daughters providing that in case of their deaths, their children were to inherit each mother's share, or if one died without children whole estate was to go to other daughter, or if both died without children estate was to go over, contingency provided against was death of daughters before testatrix and upon their survival of testatrix they took a fee simple. Nations v. Colonial & U.S. Mtg. Co., 115 Miss. 741, 76 So. 642 (1917).

Devise of land to nephew "and to the heirs of his body," gave nephew fee simple title. Wallace v. Wallace, 114 Miss. 591, 75 So. 449 (1917).

Devise of lands to four daughters providing part of any dying without issue to go to survivors, gave each of daughters a fee simple defeasible upon death without issue leaving one or more devisees surviving, and was a valid executory devise. Armstrong v. Thomas, 112 Miss. 272, 72 So. 1006 (1916).

Will devising land to nephews equally with provision that each should transfer his share to his children, and if any died without children his share to go to survivor or survivors, but if all died without children the entire property should go to grandsons for life or their heirs, or, on failure of heirs in both lines then to next of kin always preferring those bearing testator's name in equal degree of kinship, violated this statute and nephews took in fee. Nicholson v. Fields, 111 Miss. 638, 71 So. 900 (1916).

Will of all testator's property to his "sister, at her death the heirs to have it," gave sister fee simple title. Harring v. Flowers, 91 Miss. 242, 45 So. 571 (1908).

Conveyance or devise in trust to one and the heirs of his body creates a trust estate in fee simple. Powell v. Brandon, 24 Miss. 343 (1852); Jordan v. Roach, 32 Miss. 481 (1856); Dibrell v. Carlisle, 48 Miss. 691 (1873).

9. —Life estate.

Where decedent died intestate, and the surviving children entered into an agreement effectively creating a life estate for one sibling who remained on the farm, the trial court properly applied contract interpretation rules, properly found that the intent of the agreement was not to limit restraint on alienation only to time of execution of contract, and properly held the agreement was not an unreasonable restraint on alienation; thus, plaintiff's partition action was dismissed. In re Estate of Harris v. Harris, 840 So. 2d 742 (Miss. Ct. App. 2003).

Devise of land to person for life with remainder to heirs creates life estate with remainder in fee. Stigler v. Shurlds, 131 Miss. 648, 95 So. 635 (1923).

Devise of all estate to wife during widowhood, providing that if she remarried she should have one-half thereof during life with remainder to her children or if no children to testator's relatives, other half to go immediately to testator's relatives, gave wife at most indefeasible, nondevisable, and nondescendable life estate, and on her death without children her relatives took nothing. Hale v. Neilson, 112 Miss. 291, 72 So. 1011 (1916), error denied, 113 Miss. 29, 73 So. 865 (1917).

Residuary devise of estate in equal shares to 7 children for life, providing on death of any his share should be equally divided among remainder, and on death of last child property to be equally divided among all testator's living grandchildren, was single gift of life estate continuing in life tenants as a class until all dead with remainder to grandchildren in fee, and did not violate statute. Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913).

Residuary devise to two nephews for their lives, and at their death to the heirs of their body, with gift over in case of their death without issue was in effect devised to each for life of survivor, so that only life of survivor could be counted in the succession of donees, and so construed did not violate statute. Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912).

10. Miscellaneous.

A residuary bequest to the testator's son and grandchildren in equal shares, naming the five grandchildren who were alive at the time of execution, constituted a class bequest to all of the grandchildren rather than an individual bequest to each of the named grandchildren, where the evidence revealed that the testator was not aware that a sixth grandchild had been conceived, and that he was no less fond of the sixth grandchild than of the other five. Cain v. Dunn, 241 So. 2d 650 (Miss. 1970).

This section had no application to the validity of a gas and oil lease, under which any interest acquired by the lessee was conveyed to him to take effect in praesenti, and by which provision was made for renewal as long as gas and oil should be produced in paying quantities, it was stipulated that if no well should be commenced before a specified date the lease would terminate, unless the lessee by such date should tender the lessor the sum of $100, which payment should operate as a renewal for twelve months, and that further deferments for like periods might be procured by similar payments, but which lease contained no limitation to postpone the vesting of the interest acquired until a future date, or that could be said to result in a restraint against alienation either to the mineral rights or to the fee itself. Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So. 2d 282 (1941).

Testator's brothers and sisters of half blood, not being right heirs, gift over to them jointly with brothers and sisters of whole blood made them third donees under statute, and they could not take under will. Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932).

In the absence of descriptive words to point out the individuals who were to take as contingent ultimate limitees, under a former enactment of this provision, right heirs took by descent and not by purchase. West Tennessee Co. v. Townes, 52 F.2d 764 (N.D. Miss. 1931).

Under deed conveying standing timber with ten-year limitation to remove, right to perpetual extension of time for removal does not violate this section. Nichols v. Day, 128 Miss. 756, 91 So. 451 (1922).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 28 Am. Jur. 2d, Estates §§ 44 et seq.

CJS. 31 C.J.S., Estates §§ 24-26 et seq.

§ 89-1-17. Alienation good for grantor's interest; remainder not affected.

All alienations and warranties of lands purporting to convey or pass a greater estate than the grantor may lawfully convey or pass, shall operate as alienation or warranties of so much of the right and estate in such lands as the grantor could lawfully convey, but shall not pass or bar the right to the residue of the estate purported to be conveyed; nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise as to defeat, impair, or in any way affect such remainder.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (25); 1857, ch. 36, art. 7; 1871, § 2290; 1880, § 1199; 1892, § 2444; 1906, § 2774; Hemingway's 1917, § 2278; 1930, § 2118; 1942, § 839.

JUDICIAL DECISIONS

1. Conveyance as passing grantor's interest only.
2. Merger.

1. Conveyance as passing grantor's interest only.

A will devising real property to the testator's wife "to be hers during her lifetime, and to use the same for her personal comfort and benefit, as she may see fit and proper, without hindrance or trouble from anyone," creates only a life estate in the widow and does not, at her discretion, vest her with power to sell the fee. Old Ladies Home Ass'n v. Platt, 252 Miss. 260, 172 So. 2d 770 (1965).

The objection that statutory provision permitting lease of sixteenth section lands for oil, gas and mineral exploration and development, and for entry upon such lands for such purposes, was unconstitutional because the lease might under its terms remain in force so long as oil and gas should be produced from the land and therefore longer than the 25 years prescribed by a constitutional provision, is obviated by the statute providing that conveyances purporting to convey or pass a greater estate than the grantor might lawfully convey or pass, shall operate and pass such a right or estate as the grantor might lawfully convey. Pace v. State ex rel. Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

Deed conveying partnership property passes interests of only those partners actually executing it. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Am. Ann. Cas. 1913A,1081 (1910).

Supervisors' deed to timber on school land passes only such interest as they could convey. L.N. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 So. 1 (1910).

Grantee in deed from widow with only dower interest does not hold adversely to remaindermen until widow's death. Anglin v. Broadnax, 97 Miss. 514, 52 So. 865 (1910).

Deed from widow with only dower interest conveys only a life estate. Barrier v. Young, 96 Miss. 160, 50 So. 559 (1909).

Vendor's right to subject land to payment of purchase money is affected by this statute. Howell v. Hill, 94 Miss. 566, 48 So. 177 (1909).

2. Merger.

This section prevents merger of contingent remainder and life estate in holder of fee. City Sav. Bank & Trust Co. v. Cortright, 122 Miss. 75, 84 So. 136 (1920).

RESEARCH REFERENCES

ALR. Termination of trust where life interest and remainder or reversion are acquired by same person. 50 A.L.R.2d 1161.

Conveyance of land as including mature but unharvested crops. 51 A.L.R.4th 1263.

Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 23 Am. Jur. 2d, Deeds § 289.

28 Am. Jur. 2d, Estates §§ 162, 163.

51 Am. Jur. 2d, Life Tenants and Remaindermen § 84.

CJS. 26A C.J.S., Deeds §§ 231-246 et seq.

§ 89-1-19. Right of entry not tolled by death of disseizor.

If any disseizor of lands who has no right or title therein, die seized thereof, his dying seized shall not be such descent in law to the heir of the disseizor as to take away the entry of the person who, at the time of such descent, had lawful right of entry.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 3 (3); 1857, ch. 36, art. 10; 1871, § 2293; 1880, § 1200; 1892, § 2445; 1906, § 2775; Hemingway's 1917, § 2279; 1930, § 2119; 1942, § 840.

Cross References — Unlawful entry and detainer generally, see §§ 11-25-1 et seq.
Descent of land, see § 91-1-3.

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

§ 89-1-21. How body politic, public or private corporation may convey land.

All bodies politic and public corporations may convey their lands by and under the corporate seal and the signature of an officer; and such officer signing the same may acknowledge the execution of the deed, or proof thereof may be made as in other cases.

Any private corporation may convey lands by a conveyance signed in its name by an officer or by an authorized agent or attorney in fact; and such officer, agent or attorney in fact signing the same may acknowledge the execution of the conveyance, or proof thereof may be made as in other cases. The absence of the corporate seal shall not affect the validity of a conveyance by a private corporation so executed.

SOURCES: Codes, 1857, ch. 36, art. 33; 1871, § 2316; 1880, § 1194; 1892, § 2437; 1906, § 2766; Hemingway's 1917, § 2270; 1930, § 2120; 1942, § 841; Laws, 1956, ch. 175.

Cross References — Constitutional provision in regard to landholding by corporations, see MS Const Art. 4, § 84.

Limitation of actions to recover realty because of defective conveyance by corporation, see § 15-1-11.

Prohibition against corporation purchasing public lands, see § 29-1-75.

JUDICIAL DECISIONS

1. In general.

A bank was not obligated to go behind this section authorizing a private corporation to convey lands by conveyance signed in its name by an officer or authorized agent, or behind a certified copy of a corporate resolution delivered to it by the corporation's secretary, providing that the president and any vice-president could execute deeds of trust, to determine whether the two officers who did execute a deed of trust were in fact authorized to do so by the corporate resolution which appeared on the corporate minutes. Rivervalley Co. v. Deposit Guar. Nat'l Bank, 331 F. Supp. 698 (N.D. Miss. 1971).

Corporate deed executed by secretary to himself as grantee not void, where president also joined. Mexican Gulf Land Co. v. Globe Trust Co., 125 Miss. 862, 88 So. 512 (1921).

Unsealed deed by corporation will not support plaintiff's title in ejectment. Littelle v. Creek Lumber Co., 99 Miss. 241, 54 So. 841 (1911).

RESEARCH REFERENCES

Am Jur. 19 Am. Jur. 2d, Corporations § 1791.

CJS. 19 C.J.S., Corporations §§ 644 et seq.

§ 89-1-23. Aliens holding land.

Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may. Except as otherwise provided in this section, nonresident aliens shall not hereafter acquire or hold land, but a nonresident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt may purchase the same, and thereafter hold it, not longer than twenty (20) years, with full power during said time to sell the land, in fee, to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or nonresident, if he be a purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person.

Any person who was or is a citizen of the United States and became or becomes an alien by reason of marriage to a citizen of a foreign country, may hereafter inherit, or if he or she heretofore inherited or acquired or hereafter inherits, may hold, own, transmit by descent or transfer land free from any escheat to the State of Mississippi, if said land has not heretofore escheated by final valid order or decree of a court of competent jurisdiction.

Nonresident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi.

Nonresident aliens may acquire and hold not to exceed three hundred twenty (320) acres of land in this state for the purpose of industrial development thereon. In addition, any nonresident alien may acquire and hold not to exceed five (5) acres of land for residential purposes. The nonresident alien may dispose of any such land, but if any land acquired for industrial development ceases to be used for industrial development while owned by a nonresident alien, it shall escheat to the state. The limitation set forth in this paragraph shall not apply to corporations in which the stock thereof is partially or wholly owned by nonresident aliens.

SOURCES: Codes, 1892, § 2439; 1906, § 2768; Hemingway's 1917, § 2272; 1930, § 2121; 1942, § 842; Laws, 1924, ch. 165; Laws, 1938, ch. 354; Laws, 1940, ch. 237; Laws, 1988, ch. 439, § 2, eff from and after passage (approved April 25, 1988).

Cross References — Institution of quo warranto proceedings against alien acquiring or holding land contrary to law, see § 11-39-3.

Prohibition against nonresident alien purchasing public lands, see § 29-1-75.

Escheats generally, see §§ 89-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

Circumstances negated prolongation of three year period in which Honduran widow of United States citizen owning land in Mississippi could sell the land and keep the proceeds, as provided by 1928 treaty with Honduras, where widow, although represented by counsel during closing of husband's affairs in Honduras, made no inquiry nor took any action to sell land during twelve year period between her husband's death and her own. De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. Miss. 1975), reh'g denied, 513 F.2d 294 (5th Cir. 1975), cert. denied, 423 U.S. 877, 96 S. Ct. 150, 46 L. Ed. 2d 110 (1975).

This section yields to any applicable provision of any valid treaty of the United States with a foreign country, constituting a part of the supreme law of the land under article 6, clause 2, of the United States Constitution. De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. Miss. 1975), reh'g denied, 513 F.2d 294 (5th Cir. 1975), cert. denied, 423 U.S. 877, 96 S. Ct. 150, 46 L. Ed. 2d 110 (1975).

This section [Code 1942, § 842] is void, in so far as it conflicts with any existing treaty between the United States and the Republic of Italy. Guiseppe v. Cozzani, 238 Miss. 273, 118 So. 2d 189 (1960).

Foreign corporation may do business in other state or country and sue in its courts, unless forbidden by statute or contrary to public policy. State ex rel. v. Scottish Am. Mtg. Co., 111 Miss. 98, 71 So. 291 (1916).

Foreign corporation, purchaser of land under trust deed, did not, by agreeing to rescind contract of sale to residents because of defect in title and repaying purchase price, become purchaser at sale for payment of debt as it merely reacquired its original title; statute contemplates involuntary sale where alien buys only as last resort to protect lien. State ex rel. v. Scottish Am. Mtg. Co., 111 Miss. 98, 71 So. 291 (1916).

Common law excluded alien from inheriting from citizen. Scottish Am. Mtg. Co. v. Butler, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C,1236 (1911).

Nonresident alien mortgagee obtaining possession through tenants under void sale and receiving rents for more than 10 years under claim of title secured a perfect title against mortgagor. Scottish Am. Mtg. Co. v. Butler, 99 Miss. 56, 54 So. 666, Am. Ann. Cas. 1913C,1236 (1911).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 3B Am. Jur. 2d, Aliens and Citizens §§ 1731, 1732.

CJS. 3 C.J.S., Aliens §§ 5 et seq.

§ 89-1-25. Quitclaim deeds and disclaimers of title by school district boards of trustees, municipalities and boards of supervisors.

In all cases where a board of trustees of any school district, governing authorities of any municipality or board of supervisors of any county in the State of Mississippi has heretofore attempted to convey or to obtain title to real property or any interest therein and thereafter any question of title arises with reference to the procedure of conveyance, description of the property attempted to be conveyed or obtained or other matters connected therewith, and the governing authority of said school district, municipality or county determines by order entered on its minutes that the said political subdivision is asserting no further claim of title, that at the time of said attempted conveyance or disposition of said property, if property was conveyed or disposed of by the political subdivision, the said political subdivision did then receive the fair and reasonable market value of said property, and that a period of at least five (5) years has elapsed from the date of the said original attempted conveyance or disposition or obtaining of title of said property; the said board of trustees of said school district, governing authorities of said municipality or board of supervisors of said county, as the case may be, is thereupon hereby authorized, in its discretion, to execute quitclaim deeds and disclaimers of title on behalf of said political subdivision, after which any right or claim of said political subdivision in and to said realty shall be cut off and not thereafter brought into issue. Any such quitclaim deed or disclaimer of title heretofore executed by or on behalf of said political subdivision in accordance with the foregoing shall likewise be valid if executed in accordance with the provisions hereof.

SOURCES: Codes, 1942, § 846.5; Laws, 1960, ch. 321; Laws, 1974, ch. 359, eff from and after passage (approved March 14, 1974).

Cross References — Authority of board of supervisors to sell real estate belonging to county, see § 19-7-3.

Power of municipality to sell real estate, see § 21-17-1.

Sale of school property not used for school purposes, see §§ 37-7-451, 37-27-43.

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

ATTORNEY GENERAL OPINIONS

Any interest of the municipality in property owned by the county may be extinguished pursuant to this section by (a) a conveyance of such interest by the city to the county, or (b) the execution by the city of a quitclaim deed or disclaimer of title to a purchaser from the county. Creekmore, March 26, 1999, A.G. Op. #99-0129.

§ 89-1-27. Conveyances by masters, commissioners, sheriffs or other officers.

Conveyances by masters, commissioners, sheriffs, and constables for lands sold by virtue of any decree or judgment of any court in this state, shall be good and effectual for passing all the interest the defendant had in the lands to the purchaser thereof, but shall not prejudice the rights of other claimants. In case any master, commissioner, sheriff, or other officer should, for any cause whatever, fail or omit to make such conveyance, without good cause for the omission or failure, during his continuance in office, the court which rendered the judgment or decree may, on petition for that purpose, order the successor of such master, commissioner, sheriff, or other officer, to make a proper conveyance to the purchaser; and all conveyances made by masters, commissioners, sheriffs, or other officers, shall be acknowledged or proved and recorded as other conveyances. In case any tax collector should fail to make a conveyance for land sold by him for taxes of any kind during his continuance in office, the board of supervisors of the proper county, on petition for that purpose and proof of the purchase and payment of the money, may order the successor of such tax collector to make a conveyance to the purchaser.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (35); 1857, ch. 36, art. 26; 1871, § 2309; 1880, § 1198; 1892, § 2442; 1906, § 2771; Hemingway's 1917, § 2275; 1930, § 2127; 1942, § 848.

Cross References — Operation of chancery court decree as conveyance, see § 11-5-85.

Conveyance of land sold under execution, see §§ 13-3-187, 13-3-189.

Sales under execution, see § 13-3-161.

Form of conveyance by sheriff, see § 89-1-65.

Form of conveyance by administrator, executor, guardian, master, or commissioner, see § 89-1-67.

Indexing of conveyances by sheriffs, constables, marshals, masters, commissioners, executors, administrators, guardians, or trustees, see § 89-5-35.

Power of executors and administrators to make deeds of conveyance, see § 91-7-223.

Sale of land by guardian in the interest of ward, see § 93-13-51.

JUDICIAL DECISIONS

1. In general.

Tax deed erroneously reciting sale made March 4, 1906, instead of correct date March 4, 1907, cannot be reformed or validated in ex parte proceeding before supervisors. Clark v. Hibbler, 109 Miss. 432, 69 So. 220 (1915).

Purchaser at sheriff's or commissioner's sale is purchaser in invitum, and caveat emptor applies. Wells v. Gay & Ellarbee, 93 Miss. 268, 46 So. 497 (1908).

Sale under trust deed of 400 acres in bulk instead of 160 acre tracts is void. McClusky v. Trussel, 90 Miss. 544, 44 So. 69 (1906).

§ 89-1-29. Spouse's role in conveying homestead; incompetent spouse; limited power of attorney in conveyance of homestead.

A conveyance, mortgage, deed of trust or other incumbrance upon a homestead exempted from execution shall not be valid or binding unless signed by the spouse of the owner if the owner is married and living with the spouse or by an attorney in fact for the spouse. But where the spouse of the owner of the homestead exempted from execution has been adjudicated incompetent, then the owner of the homestead may file a petition in the chancery court and allege in the petition the incompetence of the spouse and the adjudication of incompetency of the spouse and the facts of the case. The summons for the spouse who has been adjudicated incompetent shall be issued and be served in the same manner as process is served in other cases on persons who are incompetent. The court shall hear the case in vacation or in termtime as in other cases, and if the court finds the spouse to be incompetent and the owner entitled to relief, the court by decree shall authorize and empower the owner to execute a conveyance, mortgage, deed of trust or other incumbrance upon the homestead without the signature of the spouse. However, no mortgage or deed of trust executed in favor of the Farmers Home Administration at the time of the purchase of real estate to secure the payment of the money used to purchase the real estate shall be invalid because it is not signed by the spouse of the owner. All powers of attorney authorizing any conveyance, mortgage, deed of trust or other incumbrance upon a homestead shall designate an attorney in fact other than the spouse and shall comply with the provisions of Chapter 3 of Title 87.

SOURCES: Codes, 1880, § 1258; 1892, § 1983; 1906, § 2159; Hemingway's 1917, § 1834; 1930, § 1778; 1942, § 330; Laws, 1924, ch. 169; 1980, ch. 514, § 1; Laws, 2007, ch. 419, § 1; Laws, 2008, ch. 442, § 23, eff from and after July 1, 2008.

Cross References — Conveyances by attorney in fact generally, see § 87-3-3.

RESEARCH REFERENCES

Am Jur. 40 Am. Jur. 2d, Homestead §§ 112 et seq.

13A Am. Jur. Pl & Pr Forms (Rev), Homestead, Forms 41 et seq. (conveyance or encumbrance of homestead where spouse incompetent).

9A Am. Jur. Legal Forms 2d Homestead, §§ 135:41 et seq. (conveyance or encumbrance of homestead).

JUDICIAL DECISIONS

1. In general.
2. Construction with other laws.
3. What constitutes homestead.
4. Validity of conveyances in general.
5. —Conveyance pursuant to premarital contract.
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8. Validity of incumbrances in general.
9. —Instrument securing payment of purchase money.
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11. Effect of abandonment of homestead.
12. Effect of change of residence.
13. Effect of separation or divorce of parties to marriage.
14. Rights and remedies of spouses.
15. Rights of grantees under deeds.
16. Rights of agents under real estate listing contracts.
17. Pleading.
18. Limitation of actions.
19. Application of doctrine of estoppel.

1. In general.

There was no merit in bank customers' argument that the 1997 renewal and extension of the previous deeds of trust deprived them of their homestead exemption; the customers admitted that the bank had a lien on their house at all times prior to the 1997 renewal. Whitefoot v. BancorpSouth Bank, 856 So. 2d 639 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 148, 160 L. Ed. 2d 52 (2004).

Statutes granting homestead exemption are entitled to be liberally construed. Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

Conditions existing at time of execution of the instrument conveying homestead determine its validity or invalidity, which cannot be affected by subsequent events. Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950).

If a husband owns no assignable interest in the land which might otherwise be claimed as a homestead, statute has no application. Davis v. Davidor, 200 Miss. 657, 27 So. 2d 371 (1946).

A conveyance of the homestead by the husband in which the wife does not join is not valid or binding if he is living with his wife or, even if he is not living with her, if at the time of the execution thereof the husband was non compos mentis touching all matters connected with and all duties and obligations owing to her. Moseley v. Larson, 86 Miss. 288, 38 So. 234 (1905).

A person who is both a citizen and resident of this state, as well as a householder having a family, is entitled to homestead exemption. Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1900).

The owner of a homestead has no vested right in the statute prescribing the mode of the alienation; and the law requiring the wife to join in the conveyance by the husband of his homestead applies to all conveyances hereafter made by him, although he owned the land in fee in his own right prior to the passage of the statute. Massey v. Womble, 69 Miss. 347, 11 So. 188 (1892).

The section [Code 1942, § 332] does not prevent the wife from devising her homestead. Kelly v. Alred, 65 Miss. 495, 4 So. 551 (1888).

The conditions existing at the time of the execution of the instrument determine its validity. Cummings v. Busby, 62 Miss. 195 (1884).

2. Construction with other laws.

In view of the provisions of §§ 11-21-3, 93-3-1 and 93-3-3, § 89-1-29 did not preclude a wife, who held real property as joint tenant with husband from whom she was separated but not divorced, from maintaining an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. Trigg v. Trigg, 498 So. 2d 334 (Miss. 1986).

Conveyance of homestead by husband alone in settlement of claim for labor is governed by this section [Code 1942, § 330] and not Code 1906, § 2156 [Code 1942, § 327]. Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912).

3. What constitutes homestead.

In a suit by an heir of deceased grantor to enjoin removal of timber from grantor's homestead under a timber deed which was void as to homestead because the wife of grantor did not sign, where it appeared that the grantor did not specifically designate the 160 acres which constituted the homestead tract out of 300 acre tract covered by deed, and the court should have appointed commissioners under the statute to make the allotment. Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953).

The statute does not require the actual utilization of every acre of land in a tract before it can be claimed as a homestead. Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

Where lands are not contiguous because a road separated them, such a separation does not necessarily defeat a homestead claim. Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

4. Validity of conveyances in general.

Wife's homestead was to be determined as of the date of execution of the deed. Since the husband and wife still lived on the Tate County farm when the deed was executed, the wife was entitled to a homestead exemption; it was only after the land swap that the wife filed a homestead application in DeSoto County, and the chancellor properly declared the exchange deed (between the father and a son), void as to the wife's homestead interest. Davis v. Smith, 922 So. 2d 814 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 130 (Miss. 2006).

Conveyance of homestead to third parties by husband during lifetime of wife without her joining in conveyance is void. Ward v. Ward, 517 So. 2d 571 (Miss. 1987).

In order to be valid, wife must sign her husband's conveyance of homestead property pursuant to the requirements of Code 1972, § 89-1-29, and where deed to homestead property was signed only by the husband without his wife's knowledge or approval, and there was nothing to indicate that the wife had any intent to abandon a conjugal relationship with her husband or to abandon the occupancy of the property, the deed was void. Hendry v. Hendry, 300 So. 2d 147 (Miss. 1974).

A conveyance of homestead which is not signed by the wife of the owner is void. Travis v. Dantzler, 244 Miss. 360, 141 So. 2d 556 (1962).

A deed is void as to the owner of the homestead who has executed a deed to the same until the other spouse joins therein with the contemporaneous consent of both; consequently, there can be no joinder by the wife in the execution of a conveyance of the homestead by the husband unless she executes the conveyance during his lifetime and with his consent. Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950).

A deed to the husband's homestead is not invalid where the husband and wife each executed it, with the knowledge and consent of the other, although they did not execute it at the same time. Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950).

A deed by the husband which attempts to convey away the homestead without the joinder of the wife in the execution of the conveyance is null and void as to both the husband and wife. Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950).

Deed to homestead by husband alone is void. Yazoo Lumber Co. v. Clark, 95 Miss. 244, 48 So. 516 (1909).

Common and contemporaneous consent existing, fact that wife signed deed to homestead 8 months after husband did not make it void. Howell v. Hill, 94 Miss. 566, 48 So. 177 (1909).

Conveyance of homestead by wife without joinder of husband is a nullity. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

5. —Conveyance pursuant to premarital contract.

Husband's deed to homestead without wife's joinder not void, where made pursuant to contract entered into prior to marriage. Minor v. Interstate Gravel Co., 130 Miss. 553, 94 So. 3 (1922).

6. —Conveyance to spouse.

While one spouse may convey to another spouse his or her interest in homestead property, statutory mandate that any conveyance of that homestead without joinder of both spouses is invalid still applies to any conveyance to third party. There can be no operative conveyance or effectual release of exemption unless statutory method is pursued with strictness, and no requirement of statute may be waived by husband and wife or by either of them. Ward v. Ward, 517 So. 2d 571 (Miss. 1987).

Deed signed by husband only, conveying part of homestead to wife and stepdaughter, held ineffective to convey interest to stepdaughter, though valid as between husband and wife. Smith v. Stanley, 159 Miss. 720, 132 So. 452 (1931).

Husband may make valid deed conveying homestead to wife, but this does not defeat his right to occupy. Williams v. Green, 128 Miss. 446, 91 So. 39 (1922).

Deed to homestead by husband alone invalid, though wife one of grantees. Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912).

7. —Miscellaneous.

Miss. Code Ann. § 89-1-29 was a clear, unambiguous statute and its plain meaning had to be applied. Because the requirements of the statute were not met, i.e., a husband had not signed the deed of trust as required by the statute, the deed of trust was neither valid nor binding, and a trial court's judgment so declaring was affirmed. Countrywide Home Loans, Inc. v. Parker, 975 So. 2d 233 (Miss. 2008).

Forfeited tax patent obtained from the State of Mississippi was set aside because a husband conveyed homestead property without permission from his wife; therefore, the conveyance was void under Miss. Code Ann. § 89-1-29, and taxes should not have accumulated on the land since a total homestead exemption applied. Alexander v. Daniel, 904 So. 2d 172 (Miss. 2005).

In a proceeding to determine heirship, the chancellor did not err in holding that a deed was not signed by, or with the authority of, a wife, as required by § 89-1-29. Goodwin v. McMurphy, 435 So. 2d 639 (Miss. 1983).

Warranty deed from mother to daughter, conveying homestead property on which mother and father were living as their home, was void where father's interest, granted to daughter by quitclaim deed, was not conveyed until some four years later. Gilmer v. Freeman, 336 So. 2d 717 (Miss. 1976).

A married woman who executes an oil and gas lease of homestead property without joinder of her husband ratifies it where, after obtaining a divorce, she conveys the subject property and quitclaims her rights to oil and gas. Bounds v. Ohio Oil Co., 234 Miss. 277, 106 So. 2d 66 (1958).

This section [Code 1942, § 332] requiring husband to join in conveyance of wife's homestead is not applicable where a husband and wife were separated for nine years when wife executed a mineral lease. Schmidt v. Humble Oil & Ref. Co., 219 F.2d 551 (5th Cir. 1955).

Where a wife did not join with husband in execution of a mineral deed, and the husband owned a legal title to the property, the mineral deed was valid as to the minerals which were under the land not within the homestead interest of the wife, but was invalid as to minerals under the homestead property. Lee v. Duncan, 220 Miss. 234, 70 So. 2d 615 (1954).

Where husband executed deed to daughter of tract of land including homestead in 1942, but wife did not join in the conveyance until 1948 after the husband's death and after suit by his heirs for partition, deed by husband was null and void as to homestead and title thereof descended to his heirs at law as tenants in common. Hughes v. Hahn, 209 Miss. 293, 46 So. 2d 587 (1950).

Execution by husband and wife of deed to homestead property to son, delivery of deed to clerk and its recordation, son being overseas in war, vested record and legal title to property in son, which could not be destroyed by destruction of recorded deed by mother. Wilbourn v. Wilbourn, 204 Miss. 206, 37 So. 2d 256 (1948), error overruled, 204 Miss. 230, 37 So. 2d 775 (1948).

The conveyance of a part of a homestead by a woman alone while living with a man as his common-law wife after their earlier divorce and her subsequent marriage to another, who died shortly after assumption of the matrimonial common-law status, was invalid because not signed by the common-law husband. Oatis v. Mingo, 199 Miss. 896, 26 So. 2d 453 (1946).

8. Validity of incumbrances in general.

Pursuant to Miss. Code Ann. § 89-1-29, where the wife debtor did not sign the deed of trust signed by her husband in favor of the creditor, the deed of trust was null and void. The fact that the wife conveyed the property to the husband on the same date that he signed the deed of trust did not affect this result. Rhymes v. Countrywide Home Loans, Inc. (In re Rhymes), — Bankr. —, 2008 Bankr. LEXIS 779 (Bankr. S.D. Miss. Mar. 14, 2008).

Pursuant to Miss. Code Ann. § 89-1-29, where the wife debtor did not sign the deed of trust signed by her husband in favor of the creditor, the deed of trust was null and void. However, because the creditor paid off two existing deeds of trust on the property, the creditor was entitled to be subrogated to the rights of the two creditors whose debts were secured by the property. Rhymes v. Countrywide Home Loans, Inc. (In re Rhymes), — Bankr. —, 2008 Bankr. LEXIS 779 (Bankr. S.D. Miss. Mar. 14, 2008).

Under Mississippi statute providing that deed of trust on homestead is invalid and not binding unless signed by spouse of owner if owner be married and living with spouse, validity of deed of trust is judged by circumstances existing at time of its execution, and subsequent actions by spouse who fails to join in execution cannot cure invalidity of instrument. Craddock v. Brinkley, 671 So. 2d 662 (Miss. 1996).

An encumbrance of homestead property signed by only one of the spouses is void and therefore may not be reformed on the ground of oversight. Strong v. Powell, 247 Miss. 55, 150 So. 2d 516 (1963).

Husband and wife may execute valid mortgage on after-acquired property used as homestead. Adkinson & Bacot Co. v. Varnado, 91 Miss. 825, 47 So. 113 (1908).

Husband and wife may execute valid mortgage on after-acquired property used as a homestead. Adkinson & Bacot Co. v. Varnado, 91 Miss. 825, 47 So. 113 (1908).

A deed of trust by a husband alone being void, his widow and children take as tenants in common at his death. Hubbard v. Sage Land & Imp. Co., 81 Miss. 616, 33 So. 413 (1903).

No conveyance of the homestead shall be valid unless signed by the wife of the owner. Duggan v. Champlin, 75 Miss. 441, 23 So. 179 (1898).

A conveyance or encumbrance by the husband of the homestead without the wife joining in the deed is not valid. Rights to a homestead are not dependent upon mistaken or false statements made by the husband, but upon the fact of his being the head of a family and residing upon the premises as a home. Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898).

Contemporaneous assent of husband and wife, if living together, is essential to an incumbrance of the exempt homestead. Duncan v. Moore, 67 Miss. 136, 7 So. 221 (1890).

9. —Instrument securing payment of purchase money.

Pursuant to Miss. Code Ann. § 89-1-29, where the wife debtor did not sign the deed of trust signed by her husband in favor of the creditor, the deed of trust was null and void. Creditor's argument that Miss. Code § 85-3-23 did not apply to debtors because a deed of trust was issued to secure a purchase money lien on the property and the homestead rights had not yet attached was without merit where the debtors had owned the property and had been occupying the property for some time prior to the time that the husband signed the deed of trust. Rhymes v. Countrywide Home Loans, Inc. (In re Rhymes), — Bankr. —, 2008 Bankr. LEXIS 779 (Bankr. S.D. Miss. Mar. 14, 2008).

Where a wife joined with her husband in executing a deed of trust to the homestead, belonging to the husband, and thereafter upon the destruction of the building by fire the insurance proceeds were paid to the husband who deposited them in his wife's name, but by agreement with the mortgagee most of such proceeds were paid to the mortgagee by the husband and used in rebuilding the destroyed home, the wife had no cause of action to set aside a foreclosure of the deed of trust since she was not prejudiced in her rights by the disposition made by her husband of the insurance money which belonged to him, not to her. McFarlane v. Plant, 185 Miss. 616, 188 So. 530 (1939).

Deed of trust securing purchase money of homestead, valid without wife's signature. Jarvis v. Armstrong, 94 Miss. 145, 48 So. 1 (1909).

Deed of trust securing money advanced for construction of house converted into homestead, valid without wife's signature. Jarvis v. Armstrong, 94 Miss. 145, 48 So. 1 (1909).

Although the husband forges his wife's name to the mortgage on land including the homestead, to secure borrowed money (the mortgagee being innocent), and a part of the money is used to pay off the purchase-money debt secured by a vendor's lien on the whole land, the mortgagee, who takes up the note for the purchase-money debt will be subrogated to the rights of the holder of the purchase-money lien as against the homestead. North Am. Trust Co. v. Lanier, 78 Miss. 418, 28 So. 804, 84 Am. St. R. 635 (1900).

A similar statute (Laws 1873, p 78) held not to be applicable where the incumbrance was to secure the purchase-money of the homestead. Billingsley v. Niblett, 56 Miss. 537 (1879).

10. —Miscellaneous.

Facts were undisputed that the proceeds of the U.S. Department of Housing and Urban Development's (HUD) subordinate loan were applied to cure the delinquent arrearage that had accrued on the primary loan; the court, however, found that the payment of the proceeds to cure the primary note arrearage did not permit the subordinate deed of trust to become a purchase money security interest. Since the deed of trust securing HUD's arrearage payment was not a purchase money security interest and since it was not signed by the debtor's spouse, the deed of trust was invalid. In re Burks, 421 B.R. 762 (Bankr. N.D. Miss. 2009).

Deed of trust being serviced was a valid lien encumbering debtor's homestead property even though it was not executed by his spouse. In re Burks, 421 B.R. 762 (Bankr. N.D. Miss. 2009).

Where the court made a finding, under Fed. R. Evid. 901(b)(3), that the debtor's signature on a deed of trust was forged, the deed of trust was void and unenforceable, pursuant to Miss. Code Ann. § 89-1-29 (1980). Ramsey v. Countrywide Home Loans, Inc. (In re Ramsey), 424 B.R. 217 (Bankr. N.D. Miss. 2009).

Arbitration clause in a contract between clients, a husband and a wife, and a termite company was enforceable against the wife, even though she did not sign the contract, because it did not encompass an incumbrance under Miss. Code Ann. § 89-1-29. Terminix Int'l, Inc., Ltd. P'ship v. Rice, 904 So. 2d 1051 (Miss. 2004).

Invalidity of deed of trust arising from spouse's failure to sign deed of trust on homestead property was not cured by spouse's act of signing promissory note one year later evidencing indebtedness to deed of trust holder; note was not attachment to nor integral part of deed of trust. Craddock v. Brinkley, 671 So. 2d 662 (Miss. 1996).

Spouse's failure to sign deed of trust on homestead property given by husband as security for loan rendered deed of trust null and void as matter of law, and thus, foreclosure sale pursuant to deed of trust had to be set aside and title to property vested in owner's son who received has interest in property via laws of descent and distribution. Craddock v. Brinkley, 671 So. 2d 662 (Miss. 1996).

The statutory signing requirements of §§ 15-3-1, 89-1-3, 89-1-29 and 91-9-1 were satisfied with respect to a deed of trust relating to homestead property, even though the wife neglected to sign the deed of trust document, where her signature appeared on the 2 attachments to the deed of trust-the property description and the adjustable rate mortgage rider-which constituted an integral part of the deed of trust. United Miss. Bank v. GMAC Mtg. Co., 615 So. 2d 1174 (Miss. 1993).

Bank was entitled to foreclose a deed of trust against homestead property for advances made to the husband, acting alone and without wife's knowledge, which were additional to the original indebtedness secured by the deed of trust contract where the contract contained a "dragnet clause" which clearly and unambiguously provided that its purpose was to "secure all loans and advances which Beneficiary has made or may hereafter make to the Grantor, or any of them"; nor did the fact that the husband pledged certain cattle as additional security for the advances, which were missing when the bank sought to replevy them, amount to a waiver on the part of the bank of the security granted it by the deed of trust. Newton County Bank, Louin Branch Office v. Jones, 299 So. 2d 215 (Miss. 1974).

"Dragnet" clause contained in a deed of trust executed by a husband and wife on their homestead property, purporting to cover "any other or further indebtedness in the way of future advances hereunder, or otherwise, that the grantor, or either of them, may now or hereafter owe the beneficiary", was not broad enough to cover an indebtedness incurred by the husband on a conditional sales contract prior to the divorce, and without the wife's concurrence or knowledge, and discounted to a bank, beneficiary of the deed of trust, or on renewal notes signed by the husband after the divorce. Hudson v. Bank of Leakesville, 249 So. 2d 371 (Miss. 1971).

Where the wife of the grantor failed to sign a deed granting right to remove timber from land owned by the grantor and occupied by him and his wife, this rendered deed void insofar as it affected the grantor's homestead. Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953).

In an action to cancel a trust deed and a foreclosure deed on the ground that it was executed at the time the husband was married to a prior wife, husband alone executed the trust deed and realty involved was the homestead of husband and wife, the note and trust deed were valid although not signed by prior wife because at time of execution of note and deed husband and wife were separated and not living together. McGehee v. Middleton, 58 So. 2d 16 (Miss. 1952).

Doctrine "he who seeks equity must do equity" not applicable in suits by husband and wife to enjoin cutting of timber under contract signed by husband alone. Young v. Ashley, 123 Miss. 693, 86 So. 458 (1920).

Deed to cut timber on homestead, not signed by wife was void, or at most only a license. Blair v. Frank B. Russell & Co., 120 Miss. 108, 81 So. 785 (1919).

A deed of trust executed by a husband who is living with his wife is void as to the homestead exemption of one hundred and sixty acres included therein without the joinder of the wife, and his widow and children take as tenants in common at his death, and a release of all exemption rights which the beneficiary in the trust deed, without further consideration, procures from the widow in eighty acres adjoining the eighty acres on which the dwelling is situated, is void for all purposes except to fix the character of such eighty acres as a part of the homestead. Hubbard v. Sage Land & Imp. Co., 81 Miss. 616, 33 So. 413 (1903).

A deed of trust drawn up and handed to the husband for his and his wife's signatures on a secular day, and after signature delivered on a secular day to the beneficiary without the latter's knowledge that it was signed on Sunday, is valid. Duggan v. Champlin, 75 Miss. 441, 23 So. 179 (1898).

A conveyance by the husband of all the merchantable timber on his homestead, with an indefinite time for its removal, is an encumbrance of such homestead and void if the wife does not join. McKenzie v. Shows, 70 Miss. 388, 12 So. 336, 35 Am. St. R. 654 (1893).

Where a husband having jointly with his wife executed a mortgage intended to include their homestead, and afterwards without authority from her, but in an honest effort to correct the mistake, inserted the homestead which had been omitted from the description, the mortgage is inoperative as to the homestead. Foote v. Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. R. 631 (1892).

11. Effect of abandonment of homestead.

Husband could not claim exemption in his former homestead after abandonment, and wife could not assert exemption which husband had abandoned, because effect of this would be to claim 2 exemptions for wife in same property. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

In order for encumbered property to constitute homestead, owner must be living with spouse; when husband removes himself from homestead property without intent to return and wife consents, homestead is abandoned notwithstanding wife's continued residence on land; question whether owner of property is living with spouse is factual. Merchants Nat'l Bank v. Southeastern Fire Ins. Co., 751 F.2d 771 (5th Cir. 1985).

Husband may convey abandoned homestead by separate deed. Lindsey v. Holly, 105 Miss. 740, 63 So. 222 (1913).

A temporary removal because of necessity by husband and wife, they retaining an intention to return to the premises, is not an abandonment of the homestead. Collins v. Bounds, 82 Miss. 447, 34 So. 355 (1903).

An incumbrance on the land of the husband, which was once his homestead, given by him alone when not residing on the land, is not rendered invalid because of an intention to re-occupy it in the future. Majors v. Majors, 58 Miss. 806 (1881).

12. Effect of change of residence.

A deed of trust on property formerly occupied as a homestead executed by the husband alone, after moving from the homestead, is not invalid as to the wife. Grantham v. Ralle, 248 Miss. 364, 158 So. 2d 719 (1963).

Husband who in good faith has selected another homestead may convey good title to his former homestead without the joining of his wife in the deed. Livelar v. Kepner, 244 Miss. 723, 146 So. 2d 346 (1962).

An exemptionist who sells his homestead in order to make a change of residence, and which he afterwards effects, can, before removal, execute a valid conveyance of the property without his wife joining him therein. Wilson v. Gray, 59 Miss. 525 (1882).

13. Effect of separation or divorce of parties to marriage.

A deed of trust on a marital homestead was invalid where (1) only the husband, and not the wife, signed the deed of trust, and (2) the deed of trust was executed prior to the separation and divorce of the husband and wife. Thurman v. Thurman, 770 So. 2d 1015 (Miss. Ct. App. 2000).

A conveyance of the homestead property by the husband without the signature of the wife is invalid, even though the wife be not living on the homestead property at the time of execution of the deed of conveyance, if her absence is occasioned by the act of the husband in driving her away from the home. Robbins v. Berry, 213 Miss. 744, 57 So. 2d 576 (1952).

Even though a wife was guilty of collusion in a divorce proceeding, she was entitled to have a deed to the homestead canceled where she was living away from the husband and her absence was occasioned by an act of the husband in driving her away, and where the purchasers who bought the homestead were not innocent purchasers. Crosby v. Hatten, 213 Miss. 240, 56 So. 2d 705 (1952).

The test whether the husband abandoned any homestead rights under statutes invalidating conveyance of the homestead is whether the husband had abandoned the conjugal relation with his wife and the occupancy of the property, but the wrongful ouster of the spouse does not constitute a wilful abandonment; and if a spouse voluntarily separates from the other and abandons the intention of living with him or her through no fault of the latter, he or she has abandoned any homestead rights. Etheridge v. Webb, 210 Miss. 729, 50 So. 2d 603 (1951).

An abandonment of a homestead may be obtained by a free and voluntary separation of the parties and the test is whether the husband was away from the homestead with the mature intention not to return to it. Etheridge v. Webb, 210 Miss. 729, 50 So. 2d 603 (1951).

A husband may not drive his wife away or otherwise by his own wrong cause her to leave, and thereupon exercise the assumed right to convey the homestead without her joinder in the conveyance, if nevertheless it remained her right and actual intention to return. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

The sole fact that the wife, for the time being, is living apart from her husband does not neutralize her right of veto upon a conveyance of the homestead by the husband. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

Where a wife leaves her husband with the intention not to return to the homestead, she loses her right to veto a conveyance of the homestead by her husband. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

The fact that a wife, leaving her husband, left some of her personal belongings at the home, while a fact to be considered in determining whether she left the homestead with the intention of returning, is not controlling. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

Where the wife's leaving her invalid husband in need of personal attention because of his bringing his widowed sister and her child to live with him and care for him while the wife was working, was without legal justification under the circumstances, the wife lost her right to veto his conveyance of the homestead, notwithstanding she may have intended to return to the homestead if and when her sister-in-law moved therefrom. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

A husband's conveyance of homestead property was not void because his wife did not join in the execution thereof, where the evidence showed that she was at the time voluntarily living away from him and refused to return to live with him. Sylvester v. Stevens, 186 Miss. 503, 191 So. 483 (1939).

Permission given by husband after legal separation from wife to lumber company to enter land and cut and remove logs therefrom held binding, under statute, against wife claiming homestead rights in such land. Lewis v. Ladner, 177 Miss. 473, 168 So. 281 (1936), error overruled, 177 Miss. 484, 172 So. 312 (1937).

Proof of husband's abandonment of homestead in unlawful entry and detainer action against wife by purchaser of land at sale on foreclosure of trust deed executed by wife alone must be clear and decisive of such intention, accompanied by husband's removal from premises. Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).

Evidence in unlawful entry and detainer action held to show that defendant's husband had not abandoned defendant or their homestead when she executed trust deed, on foreclosure of which plaintiff purchased land, so that deed, in which husband did not join, was void. Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).

Where wife signed separation agreement without coercion and separation followed, husband's deed to homestead without wife's signature was not void. Board of Mayor & Aldermen v. Clayton, 155 Miss. 428, 124 So. 490 (1929).

Divorced wife of owner receiving part of wild land by decree in divorce cannot assert homestead right against purchaser under prior trust deed made by husband. Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

In legal contemplation, the husband is living with his wife, though driven by stress of pecuniary difficulties to absent himself from his wife and home in the effort to provide for himself and family, and a deed of conveyance to the homestead by the wife during such absence of the husband is invalid. Walton v. Walton, 76 Miss. 662, 25 So. 166, 71 Am. St. R. 540 (1899).

A husband who had driven his wife from his home and refused to permit her to return, cannot lawfully convey the premises to a third person, for the law will not suffer a husband to acquire by his wrong what the statute has denied him. Scott v. Scott, 73 Miss. 575, 19 So. 589 (1896).

14. Rights and remedies of spouses.

Section 89-1-29 applies when spouses are married and living together on homestead; however, spouse forced off homestead retains § 89-1-29 veto power. Joe T. Dehmer Distribs., Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987).

While § 89-1-29 does not give wife any property right or ownership, it does give her veto power. Ward v. Ward, 517 So. 2d 571 (Miss. 1987).

A wife, who with her husband conveyed a homestead, had such an interest in the homestead that a life estate could be reserved to her as well as to her husband; since the homestead could not have been conveyed to the grantees without the consent of the wife, she would have the right to refuse to convey it unless the life estate was reserved to her. Moore v. Moore, 254 So. 2d 879 (Miss. 1971).

Where a husband and wife executed a deed of trust on their homestead property, and the deed contained a "dragnet" clause stating that it was intended to cover any other or further indebtedness that the grantors or either of them might thereafter owe the beneficiary, the clause was not sufficiently broad in its terms to secure an indebtedness of the husband on a conditional sales contract executed by the husband alone prior to the divorce of the parties and then discounted to the bank which was the beneficiary of the deed of trust, in the absence of the wife's knowledge of the transaction, and a foreclosure of the deed of trust, upon the husband's default under the conditional sales contract, would be enjoined. Hudson v. Bank of Leakesville, 249 So. 2d 371 (Miss. 1971).

In suit by husband to cancel deed of conveyance executed by wife in which husband did not join, on ground that property conveyed was homestead property, husband is entitled to prove, if he can, that property, although belonging to wife, constitutes homestead, and that he was living with wife at time conveyance thereof was executed. Etheridge v. Webb, 204 Miss. 159, 37 So. 2d 168 (1948).

In suit by husband to cancel deed of conveyance executed by wife in which husband did not join, on ground that property described in deed was homestead, burden of proof is on husband to prove that he was living with wife, either actually or in a legal sense, within the meaning of this section [Code 1942, § 332], at time she conveyed the property. Etheridge v. Webb, 204 Miss. 159, 37 So. 2d 168 (1948).

A wife living separate and apart from her husband at the time of his death was entitled to cancellation of a conveyance, executed without her knowledge, consent, or signature, to property admittedly their homestead both at the time of the separation and of the husband's death. Stringer v. Arrington, 202 Miss. 798, 32 So. 2d 879 (1947).

So long as the wife has the right and the will to remain at home, she is to be considered as living there within the meaning of the statute; the will to remain includes a situation where, being away without her own fault, the wife has the will to return, although, when she abandons the intention to return, she no longer has the right to veto a homestead conveyance even though she had the right theretofore to remain. Philan v. Turner, 195 Miss. 172, 13 So. 2d 819 (1943).

This section [Code 1942, § 330] gives the wife the veto power against encumbrances or conveyances by her husband of the exempt homestead, but imposes no limitation of his common law rights to deal with the indebtedness secured by the homestead. McFarlane v. Plant, 185 Miss. 616, 188 So. 530 (1939).

Wife's veto power against conveyance of homestead by husband is not a property right. Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

Equity will protect right of wife in homestead; wife proper party in suit to protect homestead against those claiming under instrument signed by husband alone. Young v. Ashley, 123 Miss. 693, 86 So. 458 (1920).

In that the wife has a mere veto power on the sale of a homestead and not a property right subject to bargain and sale, a promise made by the husband to the wife to secure her signature is void. New Orleans Ry. & Mill-Supply Co. v. Gatti, 77 Miss. 754, 27 So. 601 (1900).

Since a wife has only a veto power in respect to conveyance of a homestead, she cannot maintain a bill, the sole object of which is the cancellation of the husband's deed in which she did not join. Scott v. Scott, 73 Miss. 575, 19 So. 589 (1896).

Although the wife must join in the conveyance of her husband's homestead, she has no estate therein, and is not the proper party to a bill by him to cancel the trust deed thereon given by him alone, and he cannot, by joining her as a complainant, avoid the requirement in a court of chancery to do equity by offering to pay the assured debt. Pounds v. Clarke, 70 Miss. 263, 14 So. 22 (1892).

The wife has a mere veto power. Billingsley v. Niblett, 56 Miss. 537 (1879); Smith v. Scherck, 60 Miss. 491 (1882); Duncan v. Moore, 67 Miss. 136, 7 So. 221 (1890); Scott v. Scott, 73 Miss. 575, 19 So.

589 (1896); New Orleans Ry. & Mill-Supply Co. v. Gatti, 77 Miss. 754, 27 So. 601 (1900).

15. Rights of grantees under deeds.

A deed from a husband to his homestead, although void from the want of his wife's joinder therein, is good against a third party as color of title to sustain a claim by adverse possession. Johnson v. Hunt, 79 Miss. 639, 31 So. 205 (1901); Avera v. Williams, 81 Miss. 714, 33 So. 501 (1902).

A deed executed by a husband living with his wife purporting to convey his homestead is not good to convey any interest whatever therein unless it be signed by the wife. Hence, the vendee in a deed from a husband living with his wife which she did not sign, purporting to convey his homestead, cannot maintain ejectment for the lands after the death of the husband against those who claim under his heirs. Johnson v. Hunt, 79 Miss. 639, 31 So. 205 (1901).

16. Rights of agents under real estate listing contracts.

An exclusive real estate listing contract served to make the real estate agent the special agent of the owner, with limited power to find a purchaser ready, willing, and able to buy the property on terms and conditions fixed by the appellee; but the execution of such a contract did not serve to permit the agent to acquire any legal interest in the property placed in his hands for sale, nor did the contract create any incumbrance upon the property involved. C. Buck Bush Realty Co. v. Whetstone, 266 So. 2d 135 (Miss. 1972).

It is a general rule that a person who has employed a broker to sell property cannot avoid liability for the commission on the ground that he is unable to complete the transaction because his wife refused to join in the contract for sale or deed, where the broker has found a purchaser ready, willing and able to purchase the property. C. Buck Bush Realty Co. v. Whetstone, 266 So. 2d 135 (Miss. 1972).

17. Pleading.

Plea of res judicata setting up fact that in divorce proceeding property was adjudged to belong to wife should not be sustained in subsequent suit by husband to cancel deed of conveyance to property executed by wife alone on ground that property described in deed was homestead as the deed required the signature of husband if property did in fact constitute homestead at time of execution of deed and if husband was then living with wife. Etheridge v. Webb, 204 Miss. 159, 37 So. 2d 168 (1948).

Benefits of statute invalidating trust deed of wife's homestead, unless signed and acknowledged by husband living with wife, need not be affirmatively asserted by husband in unlawful entry and detainer action by purchaser at sale on foreclosure of such deed. Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).

18. Limitation of actions.

A mineral deed to homestead which was not signed by the wife of the owner, being void, did not carry with it constructive possession, and therefore the ten years statute of limitations was inapplicable to an action by the husband and wife to cancel the deed brought some 21 years after the conveyance. Travis v. Dantzler, 244 Miss. 360, 141 So. 2d 556 (1962).

Laches is not a defense to a suit to cancel a deed of the husband conveying a tract of land which constituted the spouses' family homestead, provided that the proceedings are instituted within the statutory period. Robbins v. Berry, 213 Miss. 744, 57 So. 2d 576 (1952).

19. Application of doctrine of estoppel.

Conveyance of homestead without spouse's joining in execution of deed is absolutely void, no subsequent action by non-joining spouse cures its invalidity, and where spouse is required or forced to leave homestead on account of other spouse's misconduct, and is absent at time of deed's execution, instrument is likewise invalid; divorce decree based on irreconcilable differences is not proper judgment for purposes of collaterally estopping claim by non-joining spouse. Welborn v. Lowe, 504 So. 2d 205 (Miss. 1987).

Under § 89-1-29, a married woman who, in 1940, joined her husband in executing a deed of his separate property, which was their homestead, was not estopped to assert an after-acquired title against the grantee in the deed, where the deed, though reciting that the grantors were husband and wife, did not recite that the property was homestead or the separate property of the husband and did not indicate that her joinder was pro forma or limited to a release of her homestead interest. Hinton ex rel. Hinton v. Hydraulic Pumps, Inc., 437 So. 2d 1007 (Miss. 1983).

A husband who attempts to convey part of the homestead without his wife's signature is not estopped by his warranty to assert the invalidity of the deed, even after the wife's death. Thompson v. Dyess, 218 Miss. 770, 67 So. 2d 721 (1953).

As to the contention that a deed of trust and foreclosure thereunder were void because the land involved was homestead property, and the mortgagor's wife had not joined in the execution of the deed of trust, stipulations in the deed of trust that the land covered thereby was not part of the mortgagor's homestead was not binding on him, although it was a declaration against interest to be considered by the chancellor in determining whether such land was in fact part of his homestead. Kyle v. Peoples Bank & Trust Co., 186 Miss. 287, 187 So. 534 (1939).

Wife, securing credit and advances on faith of her trust deed, held not estopped to assert invalidity thereof because not signed by husband, living with her on homestead conveyed, as defense to unlawful entry and detainer action by purchaser of land at foreclosure sale. Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).

The conveyance of a homestead, or any part of it, by the husband alone being void, a warranty clause does not create an estoppel against him even after the death of his wife. Bollen v. R.G. Lilly & Son, 85 Miss. 344, 37 So. 811, 107 Am. St. R. 291 (1905).

A deed by a husband alone purporting to convey to a railroad the right of way over his homestead, being void, is no defense to an action of trespass quare clausum fregit by the husband and wife against the railroad for entering and taking the right of way. Gulf & S.I.R.R. v. Singleterry, 78 Miss. 772, 29 So. 754 (1901).

§ 89-1-31. Repealed.

Repealed by Laws, 1980, ch. 514, § 2, eff from and after July 1, 1980.

[Codes, 1880, § 1260; 1892, § 1985; 1906, § 2161; Hemingway's 1917, § 1836; 1930, § 1780; 1942, § 332; Laws, 1924, ch. 169]

Editor's Note — Former § 89-1-31 required a husband to join in the conveyance of his wife's homestead.

§ 89-1-33. Effect of word "warrant" in conveyance.

The word "warrant" without restrictive words in a conveyance shall have the effect of embracing all of the five (5) covenants known to common law, to wit: seizin, power to sell, freedom from incumbrance, quiet enjoyment and warranty of title.

SOURCES: Codes, 1880, § 1233; 1892, § 2480; 1906, § 2817; Hemingway's 1917, § 2318; 1930, § 2122; 1942, § 843.

Cross References — Effect of the words "warrant specially," see § 89-1-35.

JUDICIAL DECISIONS

1. In general.
2. Rights and remedies upon breach.

1. In general.

Trial court erred in refusing to require the sellers to correct defects in title and convey the property to the buyer because the real estate contract required the sellers to convey by warranty deed and to cure defects, but they ignored their obligations under contract and pursued a better deal with a third party, which constituted a material breach of the contract and of the covenant of good faith and fair dealing. Under Miss. Code Ann. § 89-1-33, the warranty deed, absent other restrictive language, would have the effect of embracing all five covenants known to the common law, which were seizin, power to sell, freedom from encumbrances, quiet enjoyment and warranty of title. Ferrara v. Walters, 919 So. 2d 876 (Miss. 2005).

The wording of a deed which provided that "we hereby bargain, sell, convey and warrant to the Trustees of Oakgrove Consolidated High School and their successors the following described land…" could only connote a conveyance absolute and the grantors' children would not be heard some 50 years later to say that the grantors' intent was something entirely different from what was expressed in the plain and simple legalese in the recorded instrument of conveyance. Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989).

Under Mississippi law, a grantor is liable for breach of warranty even though the grantee has notice of an outstanding encumbrance. Mills v. Damson Oil Corp., 686 F.2d 1096 (5th Cir. 1982), reh'g denied, 691 F.2d 715 (5th Cir. 1982), certified question answered, 437 So. 2d 1005 (Miss. 1983), answer to certified question conformed to, 720 F.2d 874 (5th Cir. 1983).

Grantors conveying land under warranty deed could reserve timber, though they had only possibility of reverter. Finkbine Lumber Co. v. Saucier, 150 Miss. 446, 116 So. 736 (1928).

Purchaser with warranty deed knowing of outstanding incumbrance could not require vendor to secure release before paying balance of purchase price. Stokely v. Cooper, 150 Miss. 143, 116 So. 538, 65 A.L.R. 1137 (1928).

Grantor liable for breach of warranty, though grantee has notice of incumbrance. Sutton v. Cannon, 135 Miss. 368, 100 So. 24 (1924).

"Warrant" in deed, followed by restrictive words, embraces only warranties expressed therein. Staton v. Henry, 130 Miss. 372, 94 So. 237 (1922).

Warranty against incumbrance includes taxes; parol evidence inadmissible to show grantee assumed payment of taxes. Martin v. Partee, 121 Miss. 482, 83 So. 673 (1920).

Deed held to contain warranty against incumbrances. Garner v. Garner, 117 Miss. 694, 78 So. 623 (1918).

The word "warrant" warrants the possession or seisin as well as the title. Allen v. Caffee, 85 Miss. 766, 38 So. 186 (1905).

2. Rights and remedies upon breach.

Chancery court committed reversible error when it denied attorney fees to the purchaser of a warranty timber deed after the chancery court found in favor of the purchaser in a breach of contract action in which it was determined that the seller of the deed did not have legal title to the land. Gordon v. Gordon, 929 So. 2d 981 (Miss. Ct. App. 2006).

A purchaser under a timber warranty deed could recover reasonable attorney fees and other expenses of adjudicating title, not to exceed the price paid for the timber, when the seller breached covenants embraced by the warranty deed and the purchaser was not divested of the timber while adjudicating title. Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992).

If vendor conveys real property by warranty deed and it is subsequently determined that there is defect in chain of title, vendor has breached covenants of seizin and power to sell; in case in which covenantee is not divested of land while adjudicating title, covenantee may be awarded reasonable attorney fees and other expenses of adjudicating title, not to exceed price paid by covenantee when purchasing land. Howard v. Clanton, 481 So. 2d 272 (Miss. 1985).

Where defendant grantors warranted that they had title and the title failed, the grantees were not required to hold possession of the property conveyed until adverse possession gave them title. Guerra v. State, 209 So. 2d 627 (Miss. 1968), appeal dismissed, 393 U.S. 18, 89 S. Ct. 48, 21 L. Ed. 2d 16 (1968).

A contract to convey a merchantable title to land by a general warranty deed implies an obligation to convey a perfect, fee-simple title, and where the seller does not own and cannot convey most of the minerals underlying the land the purchaser's rescission of the contract is justified. Brent v. Corbin, 252 Miss. 464, 173 So. 2d 430 (1965).

The measure of damages for a partial failure under a covenant of warranty of title to real property is the difference between the value of the tract without the lost portion. Holcomb v. McClure, 211 Miss. 849, 52 So. 2d 922 (1951).

Purchaser's suit against vendor of realty for breach of warranty of title based on reservation of one-half interest in mineral rights by prior owner was not barred by purchaser's resale of realty where he did not convey and warrant to his vendee reserved mineral rights. Meredith v. Pratt, 208 Miss. 412, 44 So. 2d 521 (1950).

Eviction or surrender not essential to suit on warranty by grantee, buying paramount title; such action may be brought in assumpsit or in chancery. Coopwood v. McCandless, 99 Miss. 364, 54 So. 1007 (1911).

Warrantor's liability for breach of warranty is purchase price with interest. Allen v. Miller, 99 Miss. 75, 54 So. 731 (1911).

In order to recover on warranty for amount paid in purchasing paramount title or incumbrance, covenantee must show that such was paramount to title conveyed to him. Allen v. Miller, 99 Miss. 75, 54 So. 731 (1911).

A grantee in a general warranty deed who purchases land after the taxes of the current year have become a charge thereon may, after the 15th of December, pay the taxes thereon not previously paid by the grantor and at once sue for and recover the sum paid to protect the title. Swinney v. Cockrell, 86 Miss. 318, 38 So. 353 (1905).

RESEARCH REFERENCES

ALR. Breach of covenant for quiet enjoyment in lease. 41 A.L.R.2d 1414.

Am Jur. 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 45 et seq.

7A Am. Jur. Pl & Pr Forms (Rev), Covenants, Conditions, and Restrictions, Forms 1 et seq. (covenants of title).

CJS. 21 C.J.S., Covenants §§ 45 et seq.

§ 89-1-35. Effect of words "warrant specially."

The words "warrant specially," in a conveyance, shall constitute a covenant that the grantor, his heirs and personal representatives, will forever warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns, against the claims of all persons claiming by, through, or under the grantor.

SOURCES: Codes, 1880, § 1234; 1892, § 2481; 1906, § 2818; Hemingway's 1917, § 2319; 1930, § 2123; 1942, § 844.

Cross References — Effect of the word "warrant," see § 89-1-33.

JUDICIAL DECISIONS

1. In general.

Conveyance with special warranty may be grant of fee simple title. Jones v. Metzger, 132 Miss. 247, 96 So. 161 (1923).

Words "warrant specially" is warranty only against those claiming through grantor. Jones v. Metzger, 132 Miss. 247, 96 So. 161 (1923).

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions § 63, 64, 71.

CJS. 21 C.J.S., Covenants §§ 62, 63.

§ 89-1-37. Effect of a conveyance without warranty.

A conveyance without any warranty shall operate to transfer the title and possession of the grantor as a quitclaim and release.

SOURCES: Codes, 1880, § 1235; 1892, § 2482; 1906, § 2819; Hemingway's 1917, § 2320; 1930, § 2124; 1942, § 845.

Cross References — Effect of quitclaim and release, see § 89-1-39.

JUDICIAL DECISIONS

1. In general.

The heirs of an intestate who had conveyed to his wife by quitclaim deed and without any warranty, property then encumbered, and joined with her in obtaining a loan secured upon property standing in her name, are entitled to be subrogated to such encumbrances upon payment out of the intestate's estate of the debts secured. Kellner v. Kellner, 241 Miss. 53, 129 So. 2d 391 (1961).

§ 89-1-39. Effect of quitclaim and release.

A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed.

SOURCES: Codes, 1857, ch. 36, art. 17; 1871, § 2300; 1880, § 1195; 1892, § 2438; 1906, § 2767; Hemingway's 1917, § 2271; 1930, § 2125; 1942, § 846.

JUDICIAL DECISIONS

1. Estoppel.
2. Miscellaneous.

1. Estoppel.

Estoppel by deed bars a party from asserting a subsequently acquired title in derogation of his grant. Chevron Oil Co. v. Clark, 291 F. Supp. 552 (S.D. Miss. 1968), aff'd in part, rev'd on other grounds, 432 F.2d 280 (5th Cir. 1970).

Where at the time of executing a deed quitclaiming all his right, title and interest in and to all minerals in certain described lands, the grantor had no interest therein, and nothing in the quitclaim deed indicated any intention on the grantor's part to convey any interest that he might subsequently acquire, the grantor was not estopped to assert his after-acquired title, and such after-acquired title did not enure to the benefit of the grantee in the quitclaim deed and his successive grantees. McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So. 2d 105 (1957).

The estoppel created by this section [Code 1942, § 846] is coextensive only with the estate, right or interest which the conveyance purports to convey. McLaurin v. Royalties, Inc., 231 Miss. 240, 95 So. 2d 105 (1957).

Grantee in quitclaim deed acquires such title, if any, as may be then vested in grantors, but when grantors have no title when they execute deed and do not afterwards acquire any title, grantee acquires nothing by virtue of this deed and is not estopped to reply upon perfect title acquired by him elsewhere. Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

The rule that a grantor and all persons in privity with him are estopped from ever afterwards denying that, at the time his deed of conveyance was executed, he was seized of the property which his deed purported to convey, and that mortgages and deeds of trust are within this rule, has been extended by this statute to quitclaim deeds. Meyers v. AMOCO, 192 Miss. 180, 5 So. 2d 218 (1941).

The estoppel is coextensive with the estate, right, or interest which the conveyance purports to pass. McInnis v. Pickett, 65 Miss. 354, 3 So. 660 (1887); Bramlett v. Roberts, 68 Miss. 325, 10 So. 56 (1890); Houston v. National Mut. Bldg. & Loan Ass'n, 80 Miss. 31, 31 So. 540 (1902).

2. Miscellaneous.

A quitclaim deed which conveyed a 40-acre tract of land to the grantee but retained one half of all mineral rights for the grantor transferred to the grantee only the surface land where the grantor had previously conveyed an undivided one-half interest in the minerals to a third party. However, where the devisees of the grantor admitted that it had been intended by the grantor that the grantee should have a one-quarter interest in the minerals, the quitclaim deed would be interpreted to have conveyed to the grantee such interest. Rosenbaum v. McCaskey, 386 So. 2d 387 (Miss. 1980).

The doctrine of mutual mistake of fact was applicable and quitclaim deeds previously executed were cancelled and set aside where the deeds had been executed under the mistaken belief, shared by all parties, that the prior owner of the property had died intestate, whereas he had in fact died testate. Greer v. Higgins, 338 So. 2d 1233 (Miss. 1976).

Where the plaintiff conveyed by quitclaim deed to the defendant an undivided one-half interest in the property which the plaintiff would inherit from the deceased, and at the same time the defendant conveyed to the plaintiff by quitclaim deed an undivided one-half interest of the defendant, and thereafter it was revealed that the decedent had devised and bequeathed all of his property to the plaintiff, the plaintiff became the owner of an undivided three-fourths interest in the estate, including realty and personalty, and the defendant became vested with an undivided one-fourth interest in such estate. Jackson v. Rutledge, 231 So. 2d 803 (Miss. 1970).

The heirs of an intestate who had conveyed to his wife by quitclaim deed and without any warranty, property then encumbered, and joined with her in obtaining a loan secured upon property standing in her name, are entitled to be subrogated to such encumbrances upon payment out of the intestate's estate of the debts secured. Kellner v. Kellner, 241 Miss. 53, 129 So. 2d 391 (1961).

Where the mortgagor purchases from the state the land which was sold to the state for the nonpayment of the taxes and not redeemed, his action amounts merely to redemption from the tax sale and inures to the benefit of the mortgagee. Dampier v. Polk, 214 Miss. 65, 58 So. 2d 44 (1952).

Where grantee was fully aware of outstanding interest in the land in question at time of grantor's conveyance of her interest therein by quitclaim deed, grantor's subsequent acquisition of such outstanding interest on behalf of, and as mere conduit of title for, third person did not place at any disadvantage either the grantee or the beneficiaries under his will and such after-acquired title did not inure to their benefit. Crooker v. Hollingsworth, 210 Miss. 636, 46 So. 2d 541 (1950), error overruled 210 Miss. 636, 50 So. 2d 355.

When a person attempts to convey title to something that he does not in fact own, and afterwards obtains good title to the property or interest thus conveyed, such subsequent acquisition will automatically inure to benefit of his prior vendees. Perkins v. White, 208 Miss. 157, 43 So. 2d 897 (1950).

Quitclaim deed executed to each other by four devisees of tract of land, each devisee having defeasible fee simple title, by which tract was divided into four parcels and each devisee took possession of his or her allotted parcel, served to separate use and income of divided parcels but could not confer upon respective grantees fee simple title to parcels as division was made subject to, and could not change, terms of will under which devisees took defeasible fee simple title. Crump v. Phelps, 207 Miss. 682, 43 So. 2d 105 (1949).

Release of land from trust deed by beneficiary in favor of purchaser thereof did not amount to a quitclaim deed from such beneficiary, and conveyed no title to the purchaser. A.W. Stevens Lumber Co. v. Hughes, 38 So. 769 (Miss. 1905).

A quitclaim deed is as effectual to convey title as one with general warranty. Chapman v. Sims, 53 Miss. 154 (1876).

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. 2d, Deeds §§ 245, 246.

7 Am. Jur. Legal Forms 2d, Deeds §§ 87:125 et seq. (Mississippi-statutory warranty deed, statutory special warranty deed, quitclaim deed).

CJS. 26A C.J.S., Deeds § 17.

§ 89-1-41. Effect of words "grant, bargain, sell."

The words "grant, bargain, sell," shall operate as an express covenant to the grantee, his heirs and assigns, that the grantor was seized of an estate, free from incumbrance made or suffered by the grantor, except the rents and services that may be reserved, and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express word contained in the conveyance; and the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches as if the covenants above mentioned were expressly inserted.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (32); 1857, ch. 36, art. 16; 1871, § 2299; 1880, § 1196; 1892, § 2440; 1906, § 2769; Hemingway's 1917, § 2273; 1930, § 2126; 1942, § 847.

JUDICIAL DECISIONS

1. In general.

The wording of a deed which provided that "we hereby bargain, sell, convey and warrant to the Trustees of Oakgrove Consolidated High School and their successors the following described land..." could only connote a conveyance absolute and the grantors' children would not be heard some 50 years later to say that the grantors' intent was something entirely different from what was expressed in the plain and simple legalese in the recorded instrument of conveyance. Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989).

Deed purporting to "grant, bargain, sell and convey" to a railroad company, held to convey fee and not a mere easement. Alabama & V. Ry. Co. v. Mashburn, 235 Miss. 346, 109 So. 2d 533 (1959).

The use of the words, "grant, bargain and sell" in a conveyance does not imply a warranty that the grantor was seized of a fee simple estate, but only of some estate of freehold; That the grantor had only a life estate is not a breach of such implied covenant. Cunningham v. Dillard, 71 Miss. 61, 13 So. 882 (1893).

Such implied covenant cannot be extended by implication because the habendum clause of the deed is "to have and to hold the above described property to the grantee, his heirs and assigns thereafter in fee simple against the claims of any and all persons whatsoever." Cunningham v. Dillard, 71 Miss. 61, 13 So. 882 (1893).

The words "grant, bargain, sell," have no effect as a warranty when the deed contains an express covenant of warranty. Weems v. McCaughan, 15 Miss. (7 S. & M.) 422, 45 Am. Dec. 314 (1846).

RESEARCH REFERENCES

ALR. Breach of covenant for quiet enjoyment in lease. 41 A.L.R.2d 1414.

Am Jur. 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, §§ 86 et seq.

23 Am. Jur. 2d, Deeds § 166.

CJS. 21 C.J.S., Covenants §§ 47, 52.

§ 89-1-43. Mortgages and trust estates; trust estates subject to execution.

Estates of any kind holden or possessed in trust for another, shall be subject to the like debts and charges of the person to whose use or for whose benefit they are holden or possessed as they would have been subject to them if the person had owned the like interest in the thing holden or possessed as he may own in the uses or trusts thereof, whether the trusts be fully executed or not. Said estates may be sold under execution at law, so as to pass whatever interest the cestui que trust may have; and, before a sale under a mortgage or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee after breach of the condition of such mortgage or deed of trust.

SOURCES: Codes, 1857, ch. 36, art. 12; 1871, § 2295; 1880, § 1204; 1892, § 2449; 1906, § 2779; Hemingway's 1917, § 2283; 1930, § 2128; 1942, § 849.

Cross References — Conveyance of land sold under execution, see §§ 13-3-187, 13-3-189.

Notice to creditors of estate, see §§ 91-7-145, 91-7-147.

Criminal offense of removing property subject to lien either from the premises, or out of the county, or out of the state, see §§ 97-17-73 et seq.

JUDICIAL DECISIONS

1. In general.
2. Assignment.
3. Interests subject to execution.
4. Rights of purchaser at execution sale.

1. In general.

Bankruptcy court found that under Miss. Code Ann. § 89-1-43, debtor lost all legal title to debtor's real property once the underlying loan went into default, and debtor had no interest in the real property when debtor later filed for a bankruptcy petition; 11 U.S.C.S. 1322 did not help debtor as the foreclosure sale was conducted in accordance with applicable nonbankruptcy law before the petition was filed. Martin v. USDA Rural Hous. Serv., 276 Bankr. 552 (Bankr. N.D. Miss. 2001).

Legal title remains with a debtor until default, but the mortgagee has title and the right to possession once a default has occurred. Anderson v. Kimbrough, 741 So. 2d 1041 (Miss. Ct. App. 1999).

If a secured creditor is authorized to foreclose by power of sale, after the debtor's default and upon compliance with the deed of trust or other instrument, the secured creditor may sell any or all of the real estate that is subject to the security interest in its then condition or after any reasonable rehabilitation or preparation for sale. Every aspect of the sale, including the method, advertising, time, place and terms, must be commercially reasonable; this is an objective standard. Wansley v. First Nat'l Bank, 566 So. 2d 1218 (Miss. 1990).

The failure to appoint an independent trustee for a deed of trust would not invalidate the foreclosure sale of the real property. Wansley v. First Nat'l Bank, 566 So. 2d 1218 (Miss. 1990).

Where a grantee retains title to land and holds it for the benefit of another in order to secure a loan made by the grantee, the conveyance is a mortgage. The mortgage is evidenced by a deed absolute and the grantee is entitled to retain title until payment of the claim for which it is held for security. LaBarre v. Gold, 520 So. 2d 1327 (Miss. 1987).

Upon default by a debtor in performance of the conditions of a deed of trust, the trustee is empowered to foreclose pursuant to §§ 89-1-55 and 89-1-43, and, if the statutory requirements are observed, a sale under the power is a perfect foreclosure; the trustee's deed is a conveyance as absolute as if the trustee held title in fee simple, and it cuts off the equity of redemption and any other rights in and to the property, all of which are transferred to the foreclosure sale proceeds, with the sole exception of rights perfected prior to the filing of the deed of trust under which the foreclosure sale is held. Peoples Bank & Trust Co. v. L. & T. Developers, Inc., 434 So. 2d 699 (Miss. 1983), corrected, 437 So. 2d 7 (Miss. 1983).

A mortgagee in possession of property as the result of a foreclosure of a deed of trust could not be dispossessed until the indebtedness owing it had been paid or until a different party had acquired the land under a valid foreclosure sale. James v. Jackson Prod. Credit Ass'n, 389 So. 2d 494 (Miss. 1980).

Possession of land by owner and mortgagor, or his grantees, during life of deed of trust, cannot form basis of claim to adverse possession by him, since mortgagor has right to retain possession of property until foreclosure sale under deed of trust. Duncan v. Mars, 44 So. 2d 529 (Miss. 1950).

Deed conveying described land to named trustees and their successors so long as land is used for school purposes does not declare or create trust in lands, but conveys estate in fee simple defeasible. Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948).

A garageman surrendering possession of a repaired truck to its owner did not thereby lose his lien as against the holder of a deed of trust embracing the truck where there had been no breach of condition or foreclosure of the deed of trust. Watson v. Broadhead, 203 Miss. 142, 33 So. 2d 302 (1948).

After condition broken, the heirs of the grantor in a deed of trust did not have right of possession, with title passed on default to the trustee, as against either the trustee or the purchaser who succeeded to the rights of the mortgagee in possession at a void foreclosure sale, until the indebtedness was tendered or paid; and without such right of possession, essential to tenancy in common, a partition suit could not be maintained by such heirs. Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938), reinstated, 187 Miss. 882, 192 So. 29 (1939), cert. denied, 309 U.S. 630, 60 S. Ct. 616, 84 L. Ed. 988 (1940).

As against the mortgagor and the devisees under the will of the grantor in a deed of trust, the legal title of the land secured by such deed of trust passed to the trustee under this section [Code 1942, § 849] at the time of default. Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938), reinstated, 187 Miss. 882, 192 So. 29 (1939), cert. denied, 309 U.S. 630, 60 S. Ct. 616, 84 L. Ed. 988 (1940).

Mortgagee as owner of debt and incidental security may maintain action for injuries to, or conversion of, mortgaged property and apply proceeds of any recovery therefor to discharge of mortgage debt. Love v. Mississippi Cottonseed Prods. Co., 174 Miss. 697, 159 So. 96 (1935).

Title remained in grantor after executing deed of trust, and, on his death, property descended to his heirs. Wright v. Wright, 160 Miss. 235, 134 So. 197 (1931).

Declaration of trust giving trustees control of land previously held by corporations as trustees and earnings therefrom for purpose of disposition of property for benefit of certificate holders held not to violate public policy or anti-trust statutes, where not inimical to public welfare. State ex rel. Knox v. Edward Hines Lumber Co., 150 Miss. 1, 115 So. 598 (1928).

The record of a trust deed conveying land to secure a promissory note, not showing on its face that it is for the purchase money, is not constructive notice of an unrecorded deed, by which the grantor in the trust deed acquired title. Hart v. Gardner, 81 Miss. 650, 33 So. 442 (1903), error overruled, 81 Miss. 658, 33 So. 497 (1903).

A stranger cannot interpose the mortgage as an obstacle against the mortgagor seeking to recover the property or damages for its injury. Illinois Cent. R.R. v. Hawkins, 65 Miss. 200, 3 So. 410 (1888).

The statute applies to personal and real estate, and the mortgagor is capable of transmitting the legal estate by descent, devise, or deed, and the legal title in the mortgagee can only be asserted for the purpose of making the security available. Buck v. Payne & Raines, 52 Miss. 271 (1876).

2. Assignment.

A bondholder under a deed of trust became an equitable assignee, at least pro tanto of the lien and indebtedness to the extent of his holdings, when he purchased the land in question after foreclosure of the deed of trust, notwithstanding that such sale was void because minor devisees of such land were not served with process in the foreclosure proceedings in the manner required by statute; and he succeeded to the rank of a mortgagee in possession from the date of confirmation of the sale, and with the right to have such indebtedness paid or tendered as a condition precedent to the right of the minor devisees, to enter possession of their claimed interests in such land under partition. Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938), reinstated, 187 Miss. 882, 192 So. 29 (1939), cert. denied, 309 U.S. 630, 60 S. Ct. 616, 84 L. Ed. 988 (1940).

Mortgagee who assigned mortgage debt and security and did not transfer to assignee previously accrued cause of action for conversion of mortgaged property waived such cause of action, since mortgagee's interest in mortgaged property converted was based upon the mortgage and limited by debt secured and was lost by assignment. Love v. Mississippi Cottonseed Prods. Co., 174 Miss. 697, 159 So. 96 (1935).

Where debt assigned, upon default, title to mortgaged property vests in assignee with right to seize and sell conferred by mortgage. Elder v. Jones, 106 Miss. 489, 64 So. 212 (1914).

Equitable assignment of debt secured by mortgage, not assignment of real estate or interest therein, but carries security as incident thereto. Nestor v. Davis, 100 Miss. 199, 56 So. 347 (1911).

3. Interests subject to execution.

Statute providing that trust estates are subject to claims of beneficiaries' creditors and may be sold under execution at law provides no aid to creditor who proceeds in court of equity, nor can it subject trustee's estate to debts of beneficiary unless beneficiary has equitable estate in property of which trustee has legal title. Sligh v. First Nat'l Bank, 704 So. 2d 1020 (Miss. 1997), reh'g denied, 706 So. 2d 251 (Miss. 1997).

Holder of deed of trust securing indebtedness may upon default foreclose, notwithstanding prior renewal of secured indebtedness by one other than grantor in deed of trust, absent agreement to contrary. Cochran v. Deposit Guar. Nat'l Bank, 509 So. 2d 1045 (Miss. 1987).

This section [Code 1942, § 849] does not apply to active trust. Stansel v. Hahn, 96 Miss. 616, 50 So. 696 (1909).

The effect of this section [Code 1942, § 849] is to subject to sale under execution at law equitable estates which in the absence of such statute could always be subject in equity. Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892).

If creditors proceed in equity the statute does not aid them. Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892).

This section [Code 1942, § 849] applies only where there is an equitable estate in the property itself. Where there is an active trust as a mere duty or power in the trustee having the legal title to collect and pay over rents and income to the cestui que trust the statute of uses does not apply. Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892).

Personal property cannot be held under execution against the right of the mortgagee after condition broken. Butler v. Lee, 54 Miss. 476 (1877).

The interest of the mortgagee, after condition broken, is not vendible under execution. Buckley v. Daley, 45 Miss. 338 (1871).

The equity of redemption is vendible under execution before sale under the mortgage. Carpenter v. Bowen, 42 Miss. 28 (1868); Byrd v. Clarke, 52 Miss. 623 (1876); Vicksburg & M.R.R. v. McCutchen, 52 Miss. 645 (1876).

4. Rights of purchaser at execution sale.

One who buys at execution sale land standing in the name of the judgment debtor on the record of deeds acquires title against a prior unrecorded conveyance of which the judgment creditor has no notice. Hart v. Gardner, 81 Miss. 650, 33 So. 442 (1903), error overruled, 81 Miss. 658, 33 So. 497 (1903).

RESEARCH REFERENCES

ALR. Right of trustee to withhold trust payments from beneficiary to obtain payment of personal debt of latter to him, or to set off such debt against payment to beneficiary. 8 A.L.R.2d 209.

Trustee's power to compromise and settle claims and actions by or against trust estate. 35 A.L.R.2d 967.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 8 et seq.

13 Am. Jur. Legal Forms 2d, Mortgages § 179:126 (Mississippi-deed of trust).

CJS. 59 C.J.S., Mortgages §§ 41 et seq.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-1-45. Mortgage for purchase money of land.

Every mortgage given at the time of the purchase of real estate to secure the payment of the purchase money, whether such mortgage be given to the seller or to a third-party lender, shall be entitled to a preference over all judgments and other debts of the mortgagor, which preference shall extend only to the land purchased.

SOURCES: Codes, 1857, ch. 36, art. 13; 1871, § 2296; 1880, § 1205; 1892, § 2450; 1906, § 2780; Hemingway's 1917, § 2284; 1930, § 2129; 1942, § 850; Laws, 2000, ch. 341, § 1, eff from and after July 1, 2000.

Cross References — Lien on land sold on credit, see § 11-5-97.

Judgment liens, see §§ 11-7-191 et seq.

Recording of notice of suit affecting real estate, see § 11-47-3.

Redemption by mortgagee of land sold for taxes, see § 27-45-7.

Rights of purchaser at tax sale, see § 27-45-27.

Lien barred on the face of the record, see § 89-5-19.

Sale of personal property to pay purchase money for land, see § 91-7-189.

Purchase-money leases upon decedent's property, see § 91-7-209.

RESEARCH REFERENCES

ALR. Construction mortgagee-lender's duty to protect interest of subordinated purchase-money mortgagee. 13 A.L.R.5th 684.

Priority as between mechanic's lien and purchase-money mortgage. 73 A.L.R.2d 1407.

Validity and construction of provision (escalator clause) in land contract or mortgage that rate of interest payable shall increase if legal rate is raised. 60 A.L.R.3d 473.

Validity and enforceability of due-on-sale real-estate mortgage provisions. 61 A.L.R.4th 1070.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 309-311.

§ 89-1-47. Deed not shown to be mortgage by parol evidence.

A conveyance or other writing absolute on its face, where the maker parts with the possession of the property conveyed by it, shall not be proved, at the instance of any of the parties, by parol evidence, to be a mortgage only, unless fraud in this procurement be the issue to be tried.

SOURCES: Codes, 1880, § 1299; 1892, § 4233; 1906, § 4783; Hemingway's 1917, § 3127; 1930, § 3351; 1942, § 272.

JUDICIAL DECISIONS

1. In general.
2. Pleadings.
3. Evidence; burden of proof.
4. Effect of contemporaneously executed writings.

1. In general.

The wording of a deed which provided that "we hereby bargain, sell, convey and warrant to the Trustees of Oakgrove Consolidated High School and their successors the following described land..." could only connote a conveyance absolute and the grantors' children would not be heard some 50 years later to say that the grantors' intent was something entirely different from what was expressed in the plain and simple legalese in the recorded instrument of conveyance. Garraway v. Yonce, 549 So. 2d 1341 (Miss. 1989).

A conveyance by warranty deed of property for $400 which was capable of providing an annual income of $260, without any improvements having been added, and was valued at from $1650 to $2000, was grossly inadequate and was rescinded as constituting a mortgage rather than a sale. Lampley v. Pertuit, 199 So. 2d 452 (Miss. 1967).

Under this section [Code 1942, § 272] it may be proved by parol evidence that a deed absolute on its face was procured by fraud and that possession was never parted with so that the instrument was a mortgage. Bethea v. Mullins, 226 Miss. 795, 85 So. 2d 452 (1956).

Where it was shown that the grantor never parted with the possession of land conveyed, parol evidence is competent to show the conveyance to be a mortgage without showing fraud in its procurement. Emmons v. Emmons, 217 Miss. 594, 64 So. 2d 753 (1953).

Before the maker of an absolute deed can offer parol evidence to have it declared to be a mortgage only, he must show either that he had not parted with possession with the land conveyed or that there was fraud in its procurement. Nix v. Nix, 210 Miss. 821, 50 So. 2d 396 (1951).

A quitclaim deed executed by the former owner of tax-forfeited land of a quit-claim deed to the patents issued to him from the state, executed under an alleged agreement of the grantee to reconvey on payment by such former owner of the money expended for the patents, could not be considered a mortgage or security for the money, where the grantee thereunder went into possession by the mandate of the unlawful entry and detainer course, and the grantor was therefore not in a position of a mortgagor in possession. Lewis v. Williams, 186 Miss. 701, 191 So. 479 (1939).

This section [Code 1942, § 272] does not apply to a deed made by the vendors of land to one who paid the purchase price thereof on behalf of another, holding such title as security for the repayment thereof, under a parol agreement to convey it to such other person upon payment of the purchase price, where the real purchaser remained in possession. Tanous v. White, 186 Miss. 556, 191 So. 278 (1939).

Relief to the complainants by way of a conveyance of the land involved was not precluded by this section [Code 1942, § 272] where a money lender paid the purchase price of land on behalf of the complainants who were then lessees in possession thereof, and took title thereof in his own name as security for the purchase price under an oral agreement to convey it to the complainants upon payment of the purchase price. Tanous v. White, 186 Miss. 556, 191 So. 278 (1939).

Where bill seeking to have deed, in connection with contemporaneous written agreement giving option to repurchase, declared to be a mortgage, contained no allegation of fraud, statute barring parol evidence to show that instrument constituted mortgage held applicable. Dixon v. Wright, 175 Miss. 191, 166 So. 374 (1936).

This section [Code 1942, § 272] applies only to tangible property; It does not embrace the transfer of a life insurance policy made during the life of the assured, which may be shown by parol evidence to be a mere security for a debt. Armstrong v. Owens, 83 Miss. 10, 35 So. 320 (1903).

An absolute conveyance cannot be declared a mortgage on the parol evidence of the grantor, who has parted with the possession. Schwartz v. Lieber, 32 So. 954 (Miss. 1902).

Parol evidence to show that a deed absolute in form is not in fact a mortgage is admissible where the grantor has not parted with the possession of the property, or where the issue is one of fraud in the procurement of the deed, although the grantor may have parted with the possession of the property. Culp v. Wooten, 79 Miss. 503, 31 So. 1 (1902).

Where a husband and wife temporarily remove from their homestead and cultivate other lands for a year or two, leaving their children in the occupancy of the homestead, intending themselves all the time to return to it, they have not parted with its possession. Culp v. Wooten, 79 Miss. 503, 31 So. 1 (1902).

This section [Code 1942, § 272] has no application where the debtor was in possession of the grantor's property when the deed was executed and remained in possession. Fultz v. Peterson, 78 Miss. 128, 28 So. 829 (1900).

2. Pleadings.

A bill in equity to have a deed, absolute on its face, adjudged a mortgage, which charges that it was intended by the parties to be a mortgage, is not demurrable for failing to charge that the maker of the deed retained possession, or for failing to show that the agreement evidencing the intent was not in writing. Schwartz v. Lieber, 79 Miss. 257, 30 So. 649 (1901).

3. Evidence; burden of proof.

Deed acted only as debt-securing mortgage and parol evidence concerning deed was admissible to show that it had been intended for security, and not as conveyance, where grantee in deed stated on numerous occasions that deed was debt-securing mortgage, and that grantor owed him, not bank; additionally, deed at issue was one of several transactions where individuals secured loans after executing deeds to same individual who was grantee in instant case, and in those cases upon repayment, individual would reconvey property; there was also testimony that grantor had continued to express ownership interest in property until time of his death, speaking to his children about land and timber. Sweet v. Luster, 513 So. 2d 1240 (Miss. 1987).

Notwithstanding the provisions of § 89-1-47, parole evidence could be introduced to prove that a deed, absolute on its face, was intended as a mortgage, where the grantor retained possession of the property. Harris v. Kemp, 451 So. 2d 1362 (Miss. 1984).

Chancellor's finding that a deed was in fact a deed of trust given to secure the payment of funds advanced for the purchase price of the land rather than a conveyance was supported by the evidence. Fondren v. State, 199 So. 2d 625 (Miss. 1967).

After execution of a deed by a grantor to grantee, the grantee was presumed to be in possession of the undivided one-fourth interest in land which he had purchased by virtue of the deed, and the burden of proof was on those who sought to introduce parol proof to show that the grantor in the deed remained in possession after execution thereof. Conner v. Conner, 238 Miss. 471, 119 So. 2d 240 (1960).

Even if evidence concerning possession of property had shown that a grantor remained in possession of part of land after execution of the deed to grantee, appellants would not have been entitled to have the deed adjudged to be a mortgage where the evidence was insufficient to prove that the deed was intended as a mortgage. Conner v. Conner, 238 Miss. 471, 119 So. 2d 240 (1960).

In a suit to have an absolute deed declared a mortgage, where grantor retained control over the land and the grantee never assumed possession nor exercised any control over the land and in fact did not know the boundaries of the land, there was sufficient proof under this section [Code 1942, § 272] that the instrument was intended as a mortgage. Bethea v. Mullins, 226 Miss. 795, 85 So. 2d 452 (1956).

There is a presumption of possession in a grantee in a warranty deed and that the burden of proof is upon one who seeks to introduce parol proof under this section [Code 1942, § 272] to show that the grantor remained in possession. Bethea v. Mullins, 226 Miss. 795, 85 So. 2d 452 (1956).

Presumption of grantee's possession must be overcome, before deed absolute in form can be declared mortgage. Jordan v. Jordan, 145 Miss. 779, 111 So. 102 (1927).

Evidence held not to overcome presumption of grantee's possession required before declaring deed a mortgage. Jordan v. Jordan, 145 Miss. 779, 111 So. 102 (1927).

Statute held not to prohibit proof that assignment of life policy, absolute in form, is intended as collateral security. Garner v. Townes, 134 Miss. 791, 100 So. 20 (1924).

4. Effect of contemporaneously executed writings.

An unrecorded contemporaneous writing showing a recorded deed absolute in form to be a mortgage is not void; The conveyance being of record, the failure to record the writing showing its real character will not affect the validity of the mortgage. Barkwell v. Swan, 69 Miss. 907, 13 So. 809 (1892).

RESEARCH REFERENCES

ALR. The parol evidence rule and admissibility of extrinsic evidence to establish or clarify ambiguity in written contract. 40 A.L.R.3d 1384.

Am Jur. 72 Am. Jur. 2d, Statute of Frauds § 81.

4 Am. Jur. Proof of Facts 2d, Warrant Deed Intended as Mortgage, §§ 6 et seq. (proof that deed was intended as mortgage).

CJS. 37 C.J.S., Frauds, Statute of § 148.

§ 89-1-49. Extinguishment of mortgage; applicability; line of credit.

(1) Except as provided in subsections (2) and (4) of this section, payment of the money secured by any mortgage or deed of trust shall extinguish it, and revest the title in the mortgagor as effectually as if reconveyed.

(2) This section shall have no application to security agreements executed under the Mississippi Uniform Commercial Code nor to security interests created by such security agreements.

(3) As used in this section, the term "line of credit" means any loan, extension of credit or financing arrangement where the lender has agreed to make additional or future advances.

(4) This section shall have no application to a mortgage or deed of trust which states on its face that it secures a line of credit; nor to one which secures a line of credit and, under prior law, was not required to state on its face that it secures a line of credit. Mortgages or deeds of trust not covered by this section shall be extinguished as provided in subsection (5) of Section 89-5-21.

SOURCES: Codes, 1880, § 1207; 1892, § 2452; 1906, § 2782; Hemingway's 1917, § 2286; 1930, § 2152; 1942, § 873; Laws, 1968, ch. 495, § 1; Laws, 1995, ch. 497, § 1; Laws, 1999, ch. 570, § 1; Laws, 2000, ch. 580, § 1, eff from and after passage (approved May 20, 2000.)

Cross References — Remedy on mortgage barred when debt is barred, see § 15-1-21.

Limitation of actions on installments notes after foreclosure of mortgage, see § 15-1-23.

Security interests created under the Mississippi Uniform Commercial Code, see §§ 75-9-101 et seq.

Application of partial payments, see § 75-17-9.

Joint and several obligations, see §§ 85-5-1, 85-5-3.

Liens apparently barred on the face of the record, see § 89-5-19.

Entry of satisfaction upon record of mortgage or deed of trust, see § 89-5-21.

JUDICIAL DECISIONS

1. In general.

Although the assignment was absolute on its face, it gave the bank only a qualified interest in the homeowner's property. Since the assignment was given as collateral security for the homeseller's loan, the interest conveyed was commensurate with the debt; hence, when the homeseller paid off his loan to the bank, the bank's interest in the secured property ceased as of that moment, and the bank's interest was reinvested in the homeseller to the same extent as it would have been if an actual reassignment from the bank to the homeseller had been executed. McKinley v. Lamar Bank, 918 So. 2d 689 (Miss. Ct. App. 2004).

Debtor claiming usury before foreclosure sale put purchaser on notice of his claim and was entitled to have sale set aside and title declared vested in him. Hardin v. Grenada Bank, 182 Miss. 689, 180 So. 805 (1938).

In action for death of cattle, where evidence established debt secured by mortgage on cattel was paid, exclusion of mortgage from evidence was not error. Jackson County v. Meaut, 181 Miss. 282, 179 So. 343 (1938).

Mortgage which was retained by mortgagees and not canceled on record after payment of mortgage debt, and letter of mortgagors stating that they wished mortgage to continue in force as collateral security for sum subsequently advanced by mortgagees, constituted "equitable mortgage" enforceable in chancery. Turner v. Givens, 176 Miss. 214, 166 So. 367 (1936).

Payment of debt for which deed of trust had been assigned as collateral security extinguished debt, so that assignee could not foreclose deed of trust. Blacketor v. Cartee, 172 Miss. 889, 161 So. 696 (1935).

Redelivery of deed of trust on homestead, by one of grantors, after payment held not to create enforceable lien for future debt. Jones v. Hyman Mercantile Co., 134 Miss. 275, 98 So. 845 (1924).

Deed of trust or mortgage extinguished by payment. Munn v. Potter, 111 Miss. 180, 71 So. 315 (1916).

Warranty deed given to secure loan, with ticket by grantee evidencing purpose, should be cancelled or reconveyance directed upon payment of loan. Lee v. Wilkinson, 105 Miss. 358, 62 So. 275 (1913).

RESEARCH REFERENCES

ALR. Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made. 41 A.L.R.3d 7.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 345 et seq.

CJS. 59 C.J.S., Mortgages §§ 551, 552 et seq.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-1-51. Trustee may acknowledge satisfaction.

The trustee in a deed of trust may acknowledge satisfaction of the deed of trust in like manner as the cestui que trust may, and with like effect, but in such case the trustee shall be liable to the cestui que trust for the amount secured by the deed of trust.

SOURCES: Codes, 1880, § 1208; 1892, § 2453; 1906, § 2783; Hemingway's 1917, § 2287; 1930, § 2153; 1942, § 874.

Cross References — Entry of satisfaction upon record, see § 89-5-21.

JUDICIAL DECISIONS

1. In general.

Company acquiring through mesne conveyances realty sold by insane person's guardian after releases thereof by court orders from recorded trust deed, substituted for trust deeds, released of record by trustees, as security for loans of ward's funds to guardian, held without constructive notice of such instruments and hence not liable for balance due ward from guardian, where substituted deed erroneously described property. Pan-American Life Ins. Co. v. Crymes, 169 Miss. 701, 153 So. 803 (1934).

Where trustee in trust deed satisfied trust deed on records and took second trust deed, payable to himself, and assigned latter to secure his individual indebtedness, assignees were charged constructively with notice that second trust deed omitted name of real beneficiary. Eagle Lumber & Supply Co. v. De Weese, 163 Miss. 602, 135 So. 490 (1931).

Title of assignees of second trust deed held dependent upon validity of fraudulent cancellation of first trust deed by trustee. Eagle Lumber & Supply Co. v. De Weese, 163 Miss. 602, 135 So. 490 (1931).

RESEARCH REFERENCES

ALR. Conflict of laws as to application of statute proscribing or limiting availability of action for deficiency after sale of collateral real estate. 44 A.L.R.3d 922.

§ 89-1-53. Mortgages and deeds of trust on land; to be referred to in deed of conveyance under foreclosure proceedings.

If there shall be a foreclosure and sale under any such mortgage or deed of trust on land, the deed of conveyance made to a purchaser pursuant to a sale thereunder shall recite the names of all parties to and the date of such mortgage or deed of trust, and also the book and page of the record thereof, and if made by a substituted trustee shall also recite the book and page of the record of his substitution and appointment; but the omission of such recitations shall not invalidate the deed of conveyance.

SOURCES: Codes, 1906, § 2811; Hemingway's 1917, § 2312; 1930, § 2162; 1942, § 883.

ATTORNEY GENERAL OPINIONS

There is no requirement in Section 9-5-131 et seq., which would require a chancery clerk to post foreclosure notices and execute an affidavit stating that the same was posted, nor is there such requirement or authority in Sections 25-7-9, 25-7-11, and 89-1-53 et. seq., however, pursuant to Sections 25-7-33 and 25-7-45, if a clerk chooses to post such notices, he may assess a fee of $ .25 for executing an affidavit stating that the same was posted. Gex, Mar. 14, 2003, A.G. Op. #03-0112.

RESEARCH REFERENCES

Am Jur. 18 Am. Jur. Pl & Pr Forms (Rev) Mortgages, Form 153.1 (complaint, petition, or declaration-to foreclose mortgage-another form).

§ 89-1-55. How lands sold under mortgages and deeds in trust.

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by Section 111 of the Mississippi Constitution of 1890 for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two (2) or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three (3) consecutive weeks preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. No sale of lands under a deed of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.

SOURCES: Codes, 1892, § 2443; 1906, § 2772; Hemingway's 1917, § 2276; 1930, § 2167; 1942, § 888; Laws, 1896, ch. 103; Laws, 1908, ch. 180; Laws, 1934, ch. 248.

Cross References — Sale of land in subdivisions, see Miss. Const., Art. 4, § 111.

Injunctions to restrain sale of personal property seized under a deed of trust or mortgage with power of sale, see § 11-13-21.

Limitation of actions concerning land, see § 15-1-7.

Limitation on suits to redeem mortgages, see § 15-1-19.

Reinstatement of loan by savings association prior to foreclosure sale, see § 81-12-169.

Reference in deed of conveyance under foreclosure proceedings to mortgages and deeds of trust on land, see § 89-1-53.

Method of sale where terms of deed of trust or mortgage are silent, see § 89-1-57.

Suspension of mortgage foreclosure after declared disaster or emergency, see §§ 89-1-303 et seq.

Criminal offense of selling property on which there is lien without informing vendee, see § 97-19-51.

JUDICIAL DECISIONS

1. In general.
2. Validity.
3. Construction with other laws.
4. Sale in parcels.
5. Inadequacy of price.
6. Notice of sale, in general.
7. —Time of advertising.
8. —Duration of advertising.
9. —Description of land.
10. —Disclosure of name of mortgagor or his successor in title.
11. —Place of posting notice.
12. —Effect of failure to post notice.
13. Time and place of sale.
14. Cure of error by lapse of time.
15. Miscellaneous.

1. In general.

If a secured creditor is authorized to foreclose by power of sale, after the debtor's default and upon compliance with the deed of trust or other instrument, the secured creditor may sell any or all of the real estate that is subject to the security interest in its then condition or after any reasonable rehabilitation or preparation for sale. Every aspect of the sale, including the method, advertising, time, place and terms, must be commercially reasonable; this is an objective standard. Wansley v. First Nat'l Bank, 566 So. 2d 1218 (Miss. 1990).

Once deed of trust has matured by its own terms, notice of default in monetary payment is not necessary to maker who is charged with knowledge of terms of obligation. Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985).

Upon default by a debtor in performance of the conditions of a deed of trust, the trustee is empowered to foreclose pursuant to §§ 89-1-55 and 89-1-43, and, if the statutory requirements are observed, a sale under the power is a perfect foreclosure; the trustee's deed is a conveyance as absolute as if the trustee held title in fee simple, and it cuts off the equity of redemption and any other rights in and to the property, all of which are transferred to the foreclosure sale proceeds, with the sole exception of rights perfected prior to the filing of the deed of trust under which the foreclosure sale is held. Peoples Bank & Trust Co. v. L. & T. Developers, Inc., 434 So. 2d 699 (Miss. 1983), corrected, 437 So. 2d 7 (Miss. 1983).

This section [Code 1942, § 888] has no application to sales under a decree of foreclosure. Worthy v. Graham, 246 Miss. 358, 149 So. 2d 469 (1963).

Recitals in foreclosure deed raised a presumption of compliance with this section [Code 1942, § 888]. Gardner v. State, 235 Miss. 119, 108 So. 2d 592 (1959).

No equity of redemption exists after a mortgage sale. Dean v. Simpson, 235 Miss. 162, 108 So. 2d 546 (1959).

Trustee has no authority to proceed with foreclosure of deed of trust when mortgagor, pursuant to agreement for reduction in payment, has paid on indebtedness at reduced rate up to time of foreclosure and mortgagor is not in default or arrears at time of foreclosure. Triplett v. Bridgforth, 205 Miss. 328, 38 So. 2d 756 (1949).

A condition in a trust deed that the trustee foreclose the trust deed pursuant to the request of the holders of the defaulted notes secured does not require that the directors of a bank holding such notes enter a resolution on their minutes requesting foreclosure, and an executive officer of the bank may make such request. Texas Pac. Coal & Oil Co. v. Mulvihill, 200 Miss. 497, 27 So. 2d 719 (1946).

This section [Code 1942, § 888], being in derogation of the common law, must be strictly construed. Cook v. Taylor, 200 Miss. 381, 27 So. 2d 404 (1946).

Requirements of this section [Code 1942, § 888] may be waived by parties to a deed of trust. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944).

Beneficiary in deed of trust has no estate in the land, but only an interest therein to the extent that he can cause the trustee to sell the land and apply its proceeds to the payment of the secured debt. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944).

Persons foreclosing mortgages by sales should carefully follow conditions in trust deed and pertinent statutes. Wilkinson v. Federal Land Bank, 168 Miss. 645, 150 So. 218 (1933), error overruled, 168 Miss. 661, 151 So. 761 (1934).

This section [Code 1942, § 888] is inapplicable to deeds of trust executed before its passage. Davis v. O'Connell, 92 Miss. 348, 47 So. 672 (1908).

2. Validity.

Because a second mortgagee lawfully foreclosed the mortgagor's property under Miss. Code Ann. § 89-1-55 and paid off a primary loan and there was no legal prohibition under Miss. Code Ann. §§ 11-5-101 and 89-1-63 for the mortgagee's affiliate to purchase the property at foreclosure, any rights of the mortgagor in the property were extinguished by the foreclosure sale. Pepper v. Homesales, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16692 (S.D. Miss. Mar. 3, 2009).

Nonjudicial foreclosure of deed of trust constitutes private action authorized by contract and does not come within scope of due process clause of Federal Constitution. Leininger v. Merchants & Farmers Bank, 481 So. 2d 1086 (Miss. 1986).

Nonjudicial foreclosure procedure authorized by this section is not per se unconstitutional. United States v. White, 429 F. Supp. 1245 (N.D. Miss. 1977).

3. Construction with other laws.

Debtor was divested of all legal and equitable title in foreclosed property at conclusion of foreclosure sale, and therefore could not avoid sale on ground that Chapter 13 petition was filed before foreclosure deed was delivered to successful bidder at sale or recorded. In re Applewhite, 106 B.R. 468 (Bankr. S.D. Miss. 1989).

Although the district court's application of the Uniform Commercial Code was correct with respect to issues pertaining to the Small Business Administration's auction of chattel pursuant to the guaranty agreement between the SBA and appellants, which provided that the SBA may sell the secured property on default subject only that "such powers to be exercised only to the extent permitted by law", Mississippi real property law, § 89-1-55, governed the propriety of the sale of borrower's leasehold, rather than § 75-9-104(j), which specifically excludes from coverage transfers of real property, including leaseholds. United States v. Irby, 618 F.2d 352 (5th Cir. 1980).

As a defense to an action by a successor in title to redeem encumbered land from the holder of a trust deed who had purportedly purchased the encumbered land at an invalid trustee's foreclosure sale, and had taken possession of the land and paid the taxes thereon for 24 years, the holder of the trust deed could rely on either Code 1942, § 711, 10-year statute of adverse possession, or Code 1942, § 718, as a mortgagee in possession after a condition broken, notwithstanding the provision in this section [Code 1942, § 888], that an error in the mode of sale such as makes a sale void would not be cured by any statute of limitations, except after the 10-year statute of adverse possession. Gulfport Farm & Pasture Co. v. Hancock Bank, 232 Miss. 289, 98 So. 2d 862 (1957), appeal dismissed, cert. denied, 358 U.S. 67, 79 S. Ct. 122, 3 L. Ed. 2d 106 (1958).

A sale under a valid power to foreclose a mortgage lien superior to federal tax liens, which was begun before the institution of a Code 1942, § 7403 proceeding by the government to foreclose its tax lien but completed during the pendency thereof, effectually extinguished the government's tax liens. United States v. Boyd, 246 F.2d 477 (5th Cir. 1957), cert. denied, 355 U.S. 889, 78 S. Ct. 261, 2 L. Ed. 2d 188 (1957).

Where deed of trust provides trustee may sell after giving legal notice of time, place and terms of sale, Code 1906, § 2821 does not apply and it is sufficient if he complies with this section [Code 1942, § 888]. Lynchburg Shoe Co. v. Castleman, 116 Miss. 188, 76 So. 878 (1917).

4. Sale in parcels.

When trustee first offers property for sale as whole and bid of mortgagee is received and subsequently, upon objection of mortgagor, trustee offers property by individual lots with less favorable results, trustee has not acted in bad faith or unfairly. Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985).

Where parties in a deed of trust of lands in two different counties specifically contracted that each parcel be sold in a county where each was situated, statute was complied with where notices and advertisements of sale on same day for each parcel were duly posted and published in county where each was situated, without any reference to sale upon a parcel. Lee v. Magnolia Bank, 209 Miss. 804, 48 So. 2d 515 (1950).

Foreclosure sale of three 80-acre tracts of land under deed of trust is not void, although not combining with two contiguous 80-acre tracts the separated 80-acre tract so as to sell the 240 acres as whole, where homestead stood on the 160 acres, which owners used for farming purposes and separated 80-acre tract was detached about quarter or half mile, there was no road connecting them, there was no house on this 80-acre tract and it had been abandoned for farming purpose for many years. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

This section [Code 1942, § 888] is not violated by offering the land, after foreclosure of trust deed, for sale by forties and then as a whole. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

In the sale of three 80-acre tracts, two of the tracts which were contiguous should have been offered together as well as separately; and failure so to do vitiated the sale as to all three tracts. Clark v. Carpenter, 201 Miss. 436, 29 So. 2d 215 (1947).

Lands described in a trust deed other than by subdivisions of governmental surveys do not come within the language of this section [Code 1942, § 888] requiring sale in parcels. Texas Pac. Coal & Oil Co. v. Mulvihill, 200 Miss. 497, 27 So. 2d 719 (1946).

Grantor of trust deed waived requirements of this section [Code 1942, § 888] by inserting provision in deed authorizing trustee to sell the land "in parcel or as a whole, as he may deem best," and by fact that grantor was present at the sale and made no objection to the land not being offered for sale in accordance with such requirements. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944).

Parties may direct foreclosure sales in parcels or in bulk and may waive statutory requirement. Rawlings v. Anderson, 149 Miss. 632, 115 So. 714 (1928).

Trustee under trust deed offering land in 160 acre lots "undescribed" did not comply with statute and sale was void. Rawlings v. Anderson, 149 Miss. 632, 115 So. 714 (1928).

Trust deed directing trustee to sell lands or "sufficiency thereof" to satisfy debt required sale in parcel. Rawlings v. Anderson, 149 Miss. 632, 115 So. 714 (1928).

Plantation held to comprise one single tract although 80 acres was separated from balance about half a mile but connected by public road, and should have been sold as if it lay contiguously. Provine v. Thornton, 92 Miss. 395, 46 So. 950 (1908).

Provision requiring sale of land under trust deed in 160 acre tracts may be waived by parties. Brown v. British Am. Mtg. Co., 86 Miss. 388, 38 So. 312 (1905).

5. Inadequacy of price.

Sale price of property will not be found to be inadequate upon mortgagor's assertion that market value is release value established for release of single lot upon sale by subdivision developer where release value is not necessarily fair market value of lot and record does not disclose proof of fair market value otherwise. Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985).

A mortgagee, who purchased the mortgaged property at a foreclosure sale, was required to account to the mortgagor for the surplus arising from a sale of the property by the mortgagee within two weeks for two and one-half times the amount bid by the mortgagee at the foreclosure sale. Central Fin. Servs., Inc. v. Spears, 425 So. 2d 403 (Miss. 1983).

Sale of land made by trustee in foreclosing deed of trust for total bid of a little more than 50% of its value will not be set aside for inadequacy of price, if sale is otherwise valid, but inadequacy of price may be taken into consideration along with other inequities in determining whether such sale should be set aside. Triplett v. Bridgforth, 205 Miss. 328, 38 So. 2d 756 (1949).

In determining adequacy of the price paid by a mortgagee at foreclosure sale, the amount of the indebtedness unpaid and barred by the statute of limitations at the time of an action to set the sale aside was taken into consideration. Harris v. Bailey Ave. Park, 202 Miss. 776, 32 So. 2d 689 (1947).

Sale of land by trustee not set aside merely because price inadequate unless such as to shock conscience. Weyburn v. Watkins, 90 Miss. 728, 44 So. 145 (1907).

6. Notice of sale, in general.

Because Miss. Code Ann. § 89-1-55 only required the posting and publication of the notice of a foreclosure sale, a bank did not have an obligation to determine who the heirs of a deceased mortgagor were; the decedent's heirs did not open an estate until four months after the foreclosure sale. In re Estate of May v. First Fed. Bank, 32 So. 3d 1227 (Miss. Ct. App. 2010).

To suggest that debtor could avoid a foreclosure sale because notice was addressed to him rather than his conservator was illogical. The conservator's duties required him to open debtor's mail and deal with the contents in an appropriate manner, and, therefore, in this situation, notice to debtor was notice to the conservator; furthermore, the evidence showed that the conservator was living at the property and received correspondence and notices from the creditor and the creditor's attorney. In re Beasley, — Bankr. —, 2009 Bankr. LEXIS 2353 (Bankr. N.D. Miss. Aug. 20, 2009).

Under §§ 89-1-55, 89-1-57, and 89-1-59, a bank did all that it was required to do when it sent two letters to the debtor stating that it would be forced to foreclose unless it could get a subordination from the holder of a note and deed of trust; no further notice was required in the absence of any such requirement in the agreement between the bank and the debtor. EB, Inc. v. Allen, 722 So. 2d 555 (Miss. 1998).

Notice of foreclosure sale was not defective under § 89-1-55 for failing to clearly identify debtor-wife as signatory to deed where any doubts as to whether debtor-wife joined with husband in executing deed could be clarified by examining county land records. Morton v. Resolution Trust Corp., 918 F. Supp. 985 (S.D. Miss. 1995).

Where a deed of trust stated the manner in which a sale was to be conducted and notice to be given therefor, and the trustee gave the required notice of the sale of the land under a deed of trust by public notice and by advertisement, the mortgagor of the land, who in addition was given notice by mail of the bank's intent to foreclose, received proper notice, and the sale was valid. Rivervalley Co. v. Deposit Guar. Nat'l Bank, 331 F. Supp. 698 (N.D. Miss. 1971).

The holder of a secondary deed of trust has no right to notice of foreclosure, or statutory right of redemption, but may only assert an interest prior to foreclosure by paying the amounts due and subsequently engaging in foreclosure for nonpayment of his secondary deed of trust. Crystal v. Duffy, 493 So. 2d 942 (Miss. 1986).

The mortgagor of the property or a grantee thereof who has assumed the mortgage indebtedness is entitled to notice of the sale, as owner of property. Morgan v. Linham, 227 Miss. 584, 86 So. 2d 473 (1956).

Notice of trustee's sale published in a newspaper during the first of the three weeks' period of the advertisement, was not insufficient as a matter of law merely because the words "secure the payment of a certain in-" (the "in-" being the first two letters of the word "indebtedness") were printed upside down, where error was discovered and corrected in the remaining notices, and the error did not appear at all in the typewritten notice published at the courthouse. Sly v. Gilliland, 207 Miss. 356, 42 So. 2d 393 (1949).

Notice of trustee's sale containing recital that trustee had been requested to foreclose said property, without mentioning who had made the request, did not render the sale void. Sly v. Gilliland, 207 Miss. 356, 42 So. 2d 393 (1949).

Trustee's signed notation of time and place of posting notice of sale placed at bottom of notice of trustee's sale contained in proof of publication is incompetent evidence, when objected to, to show posting of notice of sale, when proof of publication was not made part of trustee's deed by its terms and recitals. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Recitals in trustee's conveyance to purchaser at foreclosure sale as to the manner in which he advertised property for sale overcame prima facie presumption that notice was properly posted and that trustee performed all acts in pais required of him. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Where the parties have agreed in the deed of trust as to the notice of sale required and such notice complies with this statute, no other notice is necessary. Harris v. Bailey Ave. Park, 202 Miss. 776, 32 So. 2d 689 (1947).

Words, "according to law," inserted with pen and ink or by typewriter in printed provision in trust deed providing for sale of the land in event of default "after giving notice of the time, place, and terms of sale, by advertisement posted at least ________ days before the day of sale in three public places in county, immediately after the words "posted at least ________ days" and "in three public places," entirely displaced the printed provision in respect to requirement as to manner of advertising foreclosure sale, so that only such requirements as then provided by law under this section [Code 1942, § 888] were necessary. Pruitt v. Dean, 198 Miss. 71, 21 So. 2d 300 (1945), suggestion of error overruled, 198 Miss. 87, 21 So. 2d 916 (1945); Pruitt v. Dean, 200 Miss. 167, 26 So. 2d 342 (1946).

Deed made by trustee under trust deed will be prima facie presumed to have been made in compliance with requirements of notice of time, place and terms of sale, unless recitals in the deed show otherwise. Chandler v. Bank of Brooksville, 181 Miss. 529, 178 So. 797 (1938).

Trustee's deed reciting that notice was published "for the length of time required by law" held sufficient in absence of evidence publication was not made weekly. Chandler v. Bank of Brooksville, 181 Miss. 529, 178 So. 797 (1938).

Recitals in trustee's deed; burden on purchaser at foreclosure to show in ejectment posting of notice of sale. Jones v. Frank, 123 Miss. 280, 85 So. 310 (1920).

7. —Time of advertising.

Publication must be made for three weeks next before and immediately preceding day of sale, and where more than one week elapsed between last advertisement and day of sale, sale was void. Planters' Mercantile Co. v. Braxton, 120 Miss. 470, 82 So. 323 (1919).

Notices published October 8, 15, 22 and 29 with sale November 2, and publication July 7, 14, 21 and 28 with sale July 31, were sufficient, less than week elapsing between last notice and day of sale. Lake v. Castleman, 116 Miss. 175, 76 So. 877 (1917).

8. —Duration of advertising.

Attorney testified that he published notice of the foreclosure sale and posted notice at the Leflore County Courthouse in Greenwood, Mississippi, for the prescribed three week period. Through the testimony of its attorney, the creditor demonstrated that it complied with the notice requirements of Miss. Code Ann. § 89-1-55. In re Beasley, — Bankr. —, 2009 Bankr. LEXIS 2353 (Bankr. N.D. Miss. Aug. 20, 2009).

Where the trustee provided for notice of sale to be published and posted for twenty-one days prior to the sale, and a publication of notice of sale was made on May 19, May 26, June 2, and June 9, 1950 and the notice of sale was posted continuously at the courthouse door May 19th to date of sale both giving notice that the sale would be held on June 12, 1950, this was a compliance with the trust deed and with this section [Code 1942, § 888]. McAllister v. Byrd, 212 Miss. 742, 55 So. 2d 435 (1951).

Any portion of statute, except the part which requires advertisement for three consecutive weeks preceding sale, may be waived by the parties or may be changed by contract of the parties. Lee v. Magnolia Bank, 209 Miss. 804, 48 So. 2d 515 (1950).

Advertisement for three consecutive weeks and sale 7 days after last publication complied with law. Donald v. Commercial Bank, 132 Miss. 578, 97 So. 12 (1923).

Advertising longer than statute requires does not render sale void. Jones v. Salmon, 128 Miss. 508, 91 So. 199 (1922).

9. —Description of land.

Notice of trustee's sale published in a newspaper and posted at courthouse correctly describing the land to be sold was sufficient notice, notwithstanding reference to deed of trust recorded in county records in which the description was defective because of improper punctuation. Sly v. Gilliland, 207 Miss. 356, 42 So. 2d 393 (1949).

Fact that trustee's deed made pursuant to foreclosure sale purported to convey land not described in deed of trust did not entitle mortgagors to cancelation of trustee's deed, where notice of foreclosure sale correctly described the land in the deed of trust. Pruitt v. Dean, 198 Miss. 71, 21 So. 2d 300 (1945), suggestion of error overruled, 198 Miss. 87, 21 So. 2d 916 (1945); Pruitt v. Dean, 200 Miss. 167, 26 So. 2d 342 (1946).

Where land is correctly described in notice of foreclosure sale but incorrectly described in trustee's deed made pursuant thereto, the purchaser at the foreclosure sale is entitled to receive at any time a corrected deed from the trustee describing the land conveyed by the deed of trust, offered for sale under the notice, and struck off to the purchaser. Pruitt v. Dean, 198 Miss. 71, 21 So. 2d 300 (1945), suggestion of error overruled, 198 Miss. 87, 21 So. 2d 916 (1945); Pruitt v. Dean, 200 Miss. 167, 26 So. 2d 342 (1946).

A bill to set aside foreclosures of deeds of trust, in which bill it was alleged that "The said trustee omitted and failed to advertise, sell or convey said West Half of Northwest Quarter of said Section 29, which was part of the security conveyed by said trust deed," was secure against demurrer when supported by an exhibit disclosing that the description of the land in the trust deed and in the posted notice, which description was erroneous, differed from the correct description in the newspaper notice. Pruitt v. Dean, 198 Miss. 71, 21 So. 2d 300 (1945), suggestion of error overruled, 198 Miss. 87, 21 So. 2d 916 (1945); Pruitt v. Dean, 200 Miss. 167, 26 So. 2d 342 (1946).

10. —Disclosure of name of mortgagor or his successor in title.

Published notice of sale was improper where name of one mortgagor of property did not appear in published notice; requirement that names of all mortgagors be published is strictly construed and omission of name of co-mortgagor invalidates sale. Haygood v. First Nat'l Bank, 517 So. 2d 553 (Miss. 1987).

Defect in description of mortgagor guardian of minors in notice of sale under this section [Code 1942, § 888] could not be relied upon to invalidate sale of mortgaged premises, in view of statute (Laws, 1934, ch. 250) providing that all mortgagors of real estate located within the state, who might have the right to set aside any title to such real estate by reason of the neglect of any trustee to insert in any notice of sale of such real estate, the name of the mortgagor, should commence suit within 12 months from the passage of such act, and upon the failure of such mortgagor or other person to commence suit within such time, the right to bring suit and the remedy to enforce such right of action should be deemed thereafter to be completely extinguished. Barbour v. Williams, 196 Miss. 409, 17 So. 2d 604 (1944).

The sale of mortgaged property under a notice setting out the mortgagor's name as B. B. Blakeney, instead of B. Blakeney as the mortgagor signed it in the deed of trust, was void as not being a sufficient compliance with the statute, which requires the identity of the mortgagor to be disclosed by setting out his correct name, notwithstanding that a notice recited the name of the mortgagor's wife who executed the mortgage with him, the date of the mortgage and the fact and place of recording, and a description of the land as set forth in the deed of trust. Blakeney v. Smith, 183 Miss. 151, 183 So. 920 (1938).

Trustee's deed held not void as to subsequent grantee because of failure to name such grantee in notice and advertisement of sale, where grantee did not assume mortgage debt and deed expressly excepted debt from warranty of the instrument. Melchor v. Casey, 173 Miss. 67, 161 So. 692 (1935).

Statute requiring advertisement of foreclosure sale to name mortgagor whose property is advertised is in derogation of common law and must be strictly pursued. Wilkinson v. Federal Land Bank, 168 Miss. 645, 150 So. 218 (1933), error overruled, 168 Miss. 661, 151 So. 761 (1934).

"Mortgagor" within statute requiring advertisement of foreclosure sale to name mortgagor includes remote grantee who assumed mortgage debt with mortgagee's consent. Wilkinson v. Federal Land Bank, 168 Miss. 645, 150 So. 218 (1933), error overruled, 168 Miss. 661, 151 So. 761 (1934).

Advertisement of foreclosure sale, which failed to name mortgagor in possession who was the last vendee through original mortgagor, rendered sale void, notwithstanding advertisement named original mortgagor. Wilkinson v. Federal Land Bank, 168 Miss. 645, 150 So. 218 (1933), error overruled, 168 Miss. 661, 151 So. 761 (1934).

11. —Place of posting notice.

State supreme court held that Miss. Code Ann. § 13-3-31 applied to Miss. Code Ann. § 89-1-55, and reversed the denial of a summary judgment motion filed by bank and trustee as the city where the newspaper was published encompassed two different counties and thus, the newspaper was deemed to be published in both counties under Miss. Code Ann. § 13-3-31(4) for purposes of the publication of foreclosure sale notices. Warren v. Johnston, 908 So. 2d 744 (Miss. 2005).

That proof of publication of notice of sale on foreclosure of a deed of trust was attached to the trustee's deed does not necessarily imply that notice was not posted at the courthouse door, where the trustee's deed, without reciting details, states that the notice required by law was given. Craft v. Everett, 237 Miss. 360, 115 So. 2d 133 (1959).

Under this section [Code 1942, § 888), notice of sale under deed of trust must be posted at the courthouse door of the county where the land is situated. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

Requirement of this section [Code 1942, § 888] that notice of sale be posted at the courthouse door is met by the posting of notice on face of stack of pasteboard cartons containing books, about half way down entrance hall of courthouse, in conspicuous place in corridor, not far from door space, where courthouse was being repaired, its doors were down for replacement, and bulletin board, which ordinarily stood nearby, was misplaced, and sheriff and others were using face of stack of cartons for posting of notices. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

So long as the required notice is posted, there can be no objection to the trustee's posting notices of sale in as many places in the county as he desires. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Although the power of sale in a trust deed covering lands located in two counties provided that notice of foreclosure sale be given in one of the counties, such provision was prohibited by this section [Code 1942, § 888] which requires that the prescribed notice be given in every county wherein the land is located. Cook v. Taylor, 200 Miss. 381, 27 So. 2d 404 (1946).

Notice must be posted at courthouse door of county where land situated both when sale is advertised in newspaper published in county and where advertised in newspaper having general circulation therein. Fauntleroy v. Mardis, 123 Miss. 353, 85 So. 96 (1920).

12. —Effect of failure to post notice.

Where notice of foreclosure sale under a trust deed covering land in different counties was published and posted in only one county and all of the land was sold as an entire tract after offering it for sale in separate lots and parcels, the sale was void, not only as to the land located in the county wherein no notice was given, but in the entirety. Cook v. Taylor, 200 Miss. 381, 27 So. 2d 404 (1946).

Foreclosure sale not advertised by posting at courthouse door is invalid. Fauntleroy v. Mardis, 123 Miss. 353, 85 So. 96 (1920).

13. Time and place of sale.

Notice specifying that the sale would be made at the south door of the courthouse was sufficient in the absence of a south door where there was only a front door and a back door, one of these being a southeast door. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Trustee's sale under deed of trust and trustee's deed given pursuant to sale held void, where notice of sale posted at courthouse door, as shown by affidavit of posting made part of deed, by mistake named a past date instead of future date as time of sale. Booker v. Federal Land Bank, 175 Miss. 281, 164 So. 877 (1936).

Lapse of twenty-four days between last publication of trustee's sale and date of sale held to render trustee's deed void on its face. Smith v. Deas, 158 Miss. 111, 130 So. 105 (1930).

Sale under deed of trust is void, more than a week elapsing between last publication and day of sale. Crump v. Tucker, 149 Miss. 711, 115 So. 397 (1928).

Sale on day following last day of three weeks' publication authorized; notice may be published a fourth time and sale made within one week thereafter. Maris v. Lindsey, 124 Miss. 742, 87 So. 12 (1921).

Trustee may fix time and place of sale, provided sufficient notice is given and sale is held within hours designated by statute. Davis v. O'Connell, 92 Miss. 348, 47 So. 672 (1908).

Erroneous date at bottom of trustee's notice of sale which properly gives time, terms and place of sale and otherwise complies with trust deed and the law, does not invalidate sale. Weyburn v. Watkins, 90 Miss. 728, 44 So. 145 (1907).

14. Cure of error by lapse of time.

Clause herein providing that an error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession, does not create a limitation and the legislature is competent to insert it, modify it or repeal it. Barbour v. Williams, 196 Miss. 409, 17 So. 2d 604 (1944).

Statute (Laws, 1934, ch. 250) providing that all mortgagors of real estate located within the state who might have the right to set aside any title to such real estate by reason of the neglect of any trustee to insert it in a notice of sale of such real estate, the name of said mortgagor, should commence suit within 12 months from the passage of such act, and upon the failure of such mortgagor or other person to commence suit within such time, the right to bring such suit, and the remedy to enforce such right of action should be deemed thereafter to be completely extinguished, if applied so as to restrict the application of the general ten-year statute of adverse possession, was not invalid as being an impairment of contract or as class or private legislation, since the right to sue is distinct from the right sought to be enforced and is remedial in character. Barbour v. Williams, 196 Miss. 409, 17 So. 2d 604 (1944).

The statute of limitations will cure an error in the mode of sale. Bradley v. Villere, 66 Miss. 399, 6 So. 208 (1889).

15. Miscellaneous.

The failure to appoint an independent trustee for a deed of trust would not invalidate the foreclosure sale of the real property. Wansley v. First Nat'l Bank, 566 So. 2d 1218 (Miss. 1990).

Debtor was divested of all legal and equitable title in foreclosed property at conclusion of foreclosure sale, and therefore could not avoid sale on ground that Chapter 13 petition was filed before foreclosure deed was delivered to successful bidder at sale or recorded. In re Applewhite, 106 B.R. 468 (Bankr. S.D. Miss. 1989).

Mortgagee seeking deficiency judgment has burden of proving entitlement under principles of equity; it must first be determined if mortgagee has endeavored to collect indebtedness out of land; then, it must be determined whether value of property satisfies debt of mortgagor or creates surplus. Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461 (Miss. 1985).

The abandonment of property by a corporate mortgagor, its failure to contest occupancy of the property by the purchaser at a trustee's foreclosure sale, and its permitting the purchaser to make improvements on the land without making known its claim, estopped the mortgagor from asserting its claim to the property as against the purchaser and the mortgagee of the purchaser. Rivervalley Co. v. Deposit Guar. Nat'l Bank, 331 F. Supp. 698 (N.D. Miss. 1971).

A sale under a deed of trust which describes the property as being in township 1, where the county contains a township 1 south and a township 1 north, but no township 1 (the notice of sale similarly describing it) is void. Seal v. Anderson, 235 Miss. 249, 108 So. 2d 864 (1959).

In suit attacking validity of foreclosure sale under deed of trust, burden of proof is on complainant to show invalidity. Clark v. Sayle, 208 Miss. 559, 45 So. 2d 138 (1950).

Undated note secured by deed of trust is not so ambiguous as to require its reformation or foreclosure by proceeding in chancery when note provides that principal is payable in ten equal successive annual installments, the last of which shall fall due on November 1, 1947, as it is plainly apparent from this language that first installment of principal was due November 1, 1938. Triplett v. Bridgforth, 205 Miss. 328, 38 So. 2d 756 (1949).

The fact that a mortgagee may be a director or officer of the corporate mortgagor does not void purchase of the property by him at a foreclosure sale not brought about by his procurement, particularly when he purchases to protect a valid interest previously acquired. Harris v. Bailey Ave. Park, 202 Miss. 776, 32 So. 2d 689 (1947).

Eleven acres described in a deed of trust as being located on the east side of the SW ¼ of NW ¼ was indefinite when offered for sale as "11 acres in the SW ¼ of the NW ¼ ," but, since the entire SW ¼ of the NW ¼ was later offered for sale, title vested in the purchaser to eleven of the forty acres, the precise eleven acres to be determined between the purchaser and the owner of the remainder of the forty acres, an attorney who conducted the sale. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Interim payments of reasonable income or rental value of property are essential condition to injunction under moratorium statutes to stay foreclosure sale. Commodore Corp. v. Davis, 178 Miss. 376, 172 So. 867 (1937).

Upon tendering amount due and all expenses of attempted foreclosure which was refused, and again tendered with their bill for injunction, and again refused, mortgagors were entitled to injunction against foreclosure sale. Hembree v. Johnson, 119 Miss. 204, 80 So. 554 (1919).

Under bill by purchaser at void sale, for resale of land, in which husband of deceased mortgagor joined, all heirs acquired right and it was error to permit dismissal in vacation. Northern v. Scruggs, 118 Miss. 353, 79 So. 227 (1918).

Provision in trust deed making default in payment of one note causing whole debt to become due and collectible at option of creditor, is valid and not a penalty. Caldwell v. Kimbrough, 91 Miss. 877, 45 So. 7 (1907).

Such provision not waived by mortgagee failing to act at once on request of debtor. Caldwell v. Kimbrough, 91 Miss. 877, 45 So. 7 (1907).

RESEARCH REFERENCES

ALR. Necessity and sufficiency of notice of sale to mortgagor where a chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 A.L.R.2d 539.

Validity, construction, and application of provisions entitling mortgagee to increase interest rate on transfer of mortgaged property. 92 A.L.R.3d 822.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 578 et seq.

18 Am. Jur. Pl & Pr Forms (Rev) Mort-

gages, Form 153.1 (complaint, petition, or declaration-to foreclose mortgage-another form).

CJS. 59 C.J.S., Mortgages §§ 932 et seq.

Law Reviews. Abbott, Some basic priority problems in a land development project in Mississippi with emphasis upon power of sale foreclosure procedures. 50 Miss. L. J. 665, September 1979.

§ 89-1-57. Deed of trust or mortgage; how sale made when terms not specified.

If a deed of trust or mortgage, with a power of sale, be silent as to the place and terms of sale and mode of advertising, a sale may be made after condition broken, for cash, upon such notice, and at such time and place as is required for sheriff's sale of like property. But all such sales shall be made in the county where the land is located, or in the county of the residence of the grantor or one (1) of the grantors, provided that where the land is situated in two (2) or more counties, the parties may contract for a sale of the whole, or any part thereof, in either county in which a part of the land lies.

SOURCES: Codes, 1880, § 1237; 1892, § 2484; 1906, § 2821; Hemingway's 1917, § 2322; 1930, § 2169; 1942, § 891; Laws, 1896, ch. 109.

Cross References — Suspension of mortgage foreclosure after declared disaster or emergency, see §§ 89-1-303 et seq.

JUDICIAL DECISIONS

1. In general.
2. Notice.

1. In general.

A deed of trust which provides that in case of default the trustee shall take possession without notice, and, after duly advertising, sell for cash, at public auction at the courthouse door, a sufficiency of the property to make payment, is not silent as to the place and terms of sale and mode of advertising within the meaning of Code 1942, § 891. Gardner v. State, 235 Miss. 119, 108 So. 2d 592 (1959).

This section [Code 1942, § 891] applies only where trust deed does not specify manner of sale. Lynchburg Shoe Co. v. Castleman, 116 Miss. 188, 76 So. 878 (1917).

Under trust deed designating place of sale outside of county, sale was properly made at place designated by this section [Code 1942, § 891]. Polk v. S.S. Dale & Sons, 93 Miss. 664, 47 So. 386, 17 Am. Ann. Cas. 754 (1908).

Deed of trust held to adopt this section [Code 1942, § 891] as to notice and manner of sale. Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827 (1908).

A trust deed providing for sale for cash at public auction at Jackson, or any suitable place, is not silent within the meaning of this section [Code 1942, § 891]. Williams v. Dreyfus, 79 Miss. 245, 30 So. 633 (1901).

This section [Code 1942, § 891] does not apply where the trustee is vested with discretion to fix the place. Goodman v. Durant Bldg. & Loan Ass'n, 71 Miss. 310, 14 So. 146 (1893).

2. Notice.

Under §§ 89-1-55, 89-1-57, and 89-1-59, a bank did all that it was required to do when it sent two letters to the debtor stating that it would be forced to foreclose unless it could get a subordination from the holder of a note and deed of trust; no further notice was required in the absence of any such requirement in the agreement between the bank and the debtor. EB, Inc. v. Allen, 722 So. 2d 555 (Miss. 1998).

Trustee may fix time and place of sale provided sufficient notice is given and sale held between hours designated by statute. Davis v. O'Connell, 92 Miss. 348, 47 So. 672 (1908).

RESEARCH REFERENCES

ALR. Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power. 30 A.L.R.2d 539.

Validity, construction, and application of provisions entitling mortgagee to increase interest rate on transfer of mortgaged property. 92 A.L.R.3d 822.

Am Jur. 46 Am. Jur. Proof of Facts 2d 695, Intent of Parties to Ambiguous Deed.

Law Reviews. Abbott, Some basic priority problems in a land development project in Mississippi with emphasis upon power of sale foreclosure procedures. 50 Miss. L. J. 665, September 1979.

§ 89-1-59. Accelerated debt may be reinstated by payment of all default before sale.

Where there is a series of notes or installment payments secured by a deed of trust, mortgage or other lien, and a provision is inserted in such instrument to secure them to the effect that upon a failure to pay any one (1) note or installment, or the interest thereon, or any part thereof, or for failure to pay taxes or insurance premiums on the property described in such instrument and the subject of such lien, that all the debt secured thereby should become due and collectible, and for any such reason the entire indebtedness shall have been put in default or declared due, the debtor, or any interested party, may at any time before a sale be made under the terms and provisions of such instrument, or by virtue of such lien, stop a threatened sale under the powers contained in such instrument or stop any proceeding in any court to enforce such lien by paying the amount of the note or installment then due or past due by its terms, with all accrued costs, attorneys' fees and trustees' fees on the amount actually past due by the terms of such instrument or lien, rather than the amount accelerated, and such taxes or insurance premiums due and not paid, with proper interest thereon, if such should have been paid by any interested party to such instrument. Any such payment or payments shall reinstate, according to the terms of such instrument, the amount so accelerated, the same as if such amount not due by its terms had not been accelerated or put in default.

SOURCES: Codes, 1930, § 2170; 1942, § 892; Laws, 1924, ch. 157; Laws, 1975, ch. 414, eff from and after passage (approved March 25, 1975).

Cross References — Limitations on actions on instalment notes after foreclosure of mortgage, see § 15-1-23.

Construction of term providing option to accelerate at will, see § 75-1-309.

Reinstatement of foreclosures by savings associations, see § 81-12-169.

JUDICIAL DECISIONS

1. In general.
2. Notice.

1. In general.

Mortgagee's refusal to accept payment after time provided for in work-out agreement, but before foreclosure proceedings were instituted, constituted misconduct such as warranted denial of mortgagee's request for attorney fees. Bank of Miss. v. McIntyre, 96 B.R. 65 (Bankr. S.D. Miss. 1988).

The holder of a secondary deed of trust has no right to notice of foreclosure, or statutory right of redemption, but may only assert an interest prior to foreclosure by paying the amounts due and subsequently engaging in foreclosure for nonpayment of his secondary deed of trust. Crystal v. Duffy, 493 So. 2d 942 (Miss. 1986).

Debtor's right to redemption of personal property subject to security interest is governed by Uniform Commercial Code (§ 75-9-506), not by § 89-1-59, which applies only to secured installment transactions which are not covered by Code. Dungan v. Dick Moore, Inc., 463 So. 2d 1094 (Miss. 1985).

A contract for the purchase and sale of certain real estate was properly cancelled pursuant to findings that defendant purchasers were in arrears in the monthly installments as well as in taxes and insurance premiums, where purchasers did not take advantage of the statutory procedure for reinstatement of accelerated debts. Stabiler v. Webb, 375 So. 2d 980 (Miss. 1979).

This section [Code 1942, § 892] gave the purchaser of an automobile under a conditional sales contract the right to reinstate the instalments under the sales contract as written upon payment of the past-due instalments, even if the entire indebtedness had been accelerated or attempted to be accelerated by the then holder of the contract, at any time before a sale of the automobile which had been repossessed when the purchaser defaulted in making payment of instalments. Dearman v. Williams, 235 Miss. 360, 109 So. 2d 316 (1959), error overruled 235 Miss. 360, 109 So. 2d 860.

2. Notice.

Under §§ 89-1-55, 89-1-57, and 89-1-59, a bank did all that it was required to do when it sent two letters to the debtor stating that it would be forced to foreclose unless it could get a subordination from the holder of a note and deed of trust; no further notice was required in the absence of any such requirement in the agreement between the bank and the debtor. EB, Inc. v. Allen, 722 So. 2d 555 (Miss. 1998).

RESEARCH REFERENCES

ALR. Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust. 69 A.L.R.3d 774.

What transfers justify acceleration under "due-on-sale" clause of real estate mortgage. 22 A.L.R.4th 1266.

Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased. 37 A.L.R.4th 286.

Right of debtor to "de-acceleration" of residential mortgage indebtedness under Chapter 13 of Bankruptcy Code of 1978 (11 USCS § 1322(b)). 67 A.L.R. Fed. 217.

§ 89-1-61. Forms for conveyances.

A conveyance of land may be in the following form, and shall be as effectual to transfer all the right, title, claim, and possession of the person making it as can be done by any sort of conveyance, viz.:

"In consideration of [here state it], I convey and warrant to ______ the land described as [describe it].

"Witness my signature, the ______ day of ______, A. D. ______."

If only a special warranty is intended, add the word "specially" to the word "warrant" in the conveyance.

SOURCES: Codes, 1880, §§ 1231, 1232; 1892, § 2479; 1906, § 2816; Hemingway's 1917, § 2317; 1930, § 2131; 1942, § 852.

Cross References — Form of conveyance at tax sale, see § 27-45-23.

JUDICIAL DECISIONS

1. In general.
2. Reservation of rights.

1. In general.

A deed which is defectively acknowledged by reason of the fact that word "delivered" was omitted from acknowledgment is good as between the parties. Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948).

An instrument in the form of a deed which provided that the grantors were to retain possession, control and occupancy of the lands during their lifetime and then vest in the purported grantee, "but not until the death of both grantors herein, does the title pass," was testamentary in character and did not meet the requirement of a deed that it must convey some estate effective upon delivery. Coulter v. Carter, 200 Miss. 135, 26 So. 2d 344 (1946).

Instrument conveying in praesenti a remainder held a deed and not a will. Johnson v. Seely, 139 Miss. 60, 103 So. 499 (1925).

If conveyance is sufficiently certain, additional description failing as to accuracy should be rejected as surplusage; on contradiction in description of premises conveyed, mistaken part should be rejected and other allowed to stand. Ladnier v. Cuevas, 138 Miss. 502, 103 So. 217 (1925).

Debtor's suit to reform deed to third party by creditor, to whom debtor had conveyed land by deed intended as mortgage, held not barred by limitation, right of action not accruing until execution of deed to third party. Allison v. Burnham, 136 Miss. 13, 100 So. 518 (1924).

That absolute deed was intended as mortgage may be shown by parol. Allison v. Burnham, 136 Miss. 13, 100 So. 518 (1924).

Covenant held to be for grantor's benefit, so that grantee would not be permitted to make default and to tender back the land and receive payment. Kent v. Stevenson, 127 Miss. 529, 90 So. 241 (1922).

Condition subsequent strictly construed. Kent v. Stevenson, 127 Miss. 529, 90 So. 241 (1922).

Deed accompanied by written agreement on part of grantee to convey to third party on payment of sum of money, third party then being in and remaining in possession, may be shown to be a mortgage. Williams v. Butts, 124 Miss. 661, 87 So. 145 (1921).

Deed conveying 175 acres more or less, by metes and bounds, does not convey 300 acres of accretions attached to original tract before conveyance. Houston Bros. v. Grant, 112 Miss. 465, 73 So. 284, Am. Ann. Cas. 1918E,243 (1916).

Instrument in form of deed "to take effect only after death of the grantor" was testamentary in character and not a deed. Simpson v. McGee, 112 Miss. 344, 73 So. 55, 11 A.L.R. 4 (1916).

Under this section [Code 1942, § 852] the word "warrant" constitutes a warranty of the possession as well as of the title. Allen v. Caffee, 85 Miss. 766, 38 So. 186 (1905).

The words "convey and warrant" are effective "to transfer all the right, title, claim and possession" of the grantor only when an intention to convey a less estate is not expressed in the deed. Hart v. Gardner, 74 Miss. 153, 20 So. 877 (1896).

2. Reservation of rights.

Where a conveyance of land contains a reservation to the grantor of "all minerals," both liquid and solid, that phrase will not be deemed to include sand and gravel in the absence of a specific designation of sand and gravel as being intended to be reserved. Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954).

Owner of mineral may remove it from land, though other person owns surface but must allow sufficient land to remain to support surface. Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922), overruled on other grounds, Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954).

Owner of minerals not enjoined from removing it at instance of owner of surface unless injury to surface is irreparable. Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922), overruled on other grounds, Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954).

Under deed reserving timber with right-of-way for removing it, and providing for removal within 12 months, grantor conveyed land with timber absolutely subject to his right to remove timber within 12 months or same would pass to grantee. Hand v. Fillingame, 92 Miss. 185, 45 So. 569 (1908).

RESEARCH REFERENCES

ALR. Written matter as controlling printed matter in construction of deed. 37 A.L.R.2d 820.

Specificity of description of premises as affecting enforceability of contract to convey real property-modern cases. 73 A.L.R.4th 135.

Am Jur. 7 Am. Jur. Legal Forms 2d, Deeds §§ 87:125 et seq. (Mississippi-statutory warranty deed, statutory special warranty deed, quitclaim deed).

38 Am. Jur. Proof of Facts 2d 633, Dedication of Land to Public Use.

§ 89-1-63. Deed of trust or mortgage; power of sale; relationship of trustee to other party to deed of trust; beneficiary may purchase at sale made under power of sale; appointment or substitution of trustee by beneficiary.

(1) A deed of trust or mortgage may be in the form of a conveyance, to the end, before the words "witness my signature," and then as follows, viz.:

"In trust to secure (here state what is secured, and all the necessary provisions).

Witness my signature, the ______ day of ______________, A.D. ________.

______________"

(2) Notwithstanding the form of conveyance, any deed of trust or mortgage which has been made or shall hereafter be made may confer on the trustee or mortgagee and their successors, assignees and agents the power of sale. Furthermore, any person may be appointed and may perform the duties of the trustee in a deed of trust, and such person shall not be disqualified nor shall the acts of such person be invalid because of the relationship of such person to any other party to the deed of trust. The beneficiary of a deed of trust or the mortgagee of a mortgage may purchase at any sale which has been made or shall hereafter be made under a power of sale, and any such sale shall not be invalid because of the relationship of such person to any other party to the deed of trust.

(3) The beneficiary or holder of any deed of trust, including his agents, employees, successors, assigns, attorneys-in-fact or other legal representatives, may appoint a trustee or substitute a trustee, with or without the permission of the mortgagor or mortgagors. The trustee or substitute trustee so appointed may be a natural person, partnership, corporation, limited liability company, professional association or any other legal entity.

SOURCES: Codes, 1892, § 2483; 1906, § 2820; Hemingway's 1917, § 2321; 1930, § 2132; 1942, § 853; Laws, 1990, ch. 489, § 1; Laws, 2007, ch. 383, § 1, eff from and after passage (approved Mar. 15, 2007.)

Cross References — Requirement that declaration of trust be in writing, see § 91-9-1.

JUDICIAL DECISIONS

1. In general.

Because a second mortgagee lawfully foreclosed the mortgagor's property under Miss. Code Ann. § 89-1-55 and paid off a primary loan and there was no legal prohibition under Miss. Code Ann. §§ 11-5-101 and 89-1-63 for the mortgagee's affiliate to purchase the property at foreclosure, any rights of the mortgagor in the property were extinguished by the foreclosure sale. Pepper v. Homesales, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 16692 (S.D. Miss. Mar. 3, 2009).

Miss. Code Ann. § 89-1-63 contains no requirement that the person named as trustee give consent or otherwise have any knowledge of being appointed; the fact that the person did not know that he was the designated trustee was not a sufficient reason to invalidate the deed of trust. Chism v. Southern Mortg. Co. (In re Chism), — Bankr. —, 2007 Bankr. LEXIS 1365 (Bankr. N.D. Miss. Apr. 24, 2007).

RESEARCH REFERENCES

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 66 et seq.

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:453 (foreclosure by action-mortgagee's purchase of property on foreclosure); §§ 179:454 et seq. (power of sale).

CJS. 59 C.J.S., Mortgages §§ 146 et seq.

§ 89-1-65. Sheriff's conveyance.

A conveyance of land sold by a sheriff under execution may be in the following form, and shall be sufficient to convey all of the title of the defendant in the execution, which any conveyance such officer might make would in such case convey; and a conveyance by a constable in like form, the proper changes being made, shall have the like effect in case of sale made by him, viz.:

"By virtue of an execution issued by the clerk of the circuit court of ________ county, on the ________ day of ________, A.D. ________, returnable before said court on the ________ Monday of ________, A.D. ________, to enforce the judgment of said court, rendered on the ________ day of ________, A.D. ________, in favor of ________ against ________, for ________ dollars, and costs, I, as sheriff of ________ county, have this day, according to law, sold the following lands, to wit: [here describe the land]; when ________ became the best bidder therefor at the sum of ________ dollars, and he having paid said sum of money, I now convey said land to him.

"Witness my hand, the ________, A. D. ________

____________________ Sheriff."

SOURCES: Codes, 1880, § 1241; 1892, § 2485; 1906, § 2822; Hemingway's 1917, § 2323; 1930, § 2133; 1942, § 854.

Cross References — Operation of chancery court decree as conveyance, see §§ 11-5-85 et seq.

Conveyance of land sold under execution, see §§ 13-3-187, 13-3-189.

Sheriff's conveyances generally, see § 89-1-27.

Indexing of sheriff's conveyance, see § 89-5-35.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Judicial Sales §§ 1 et seq.

§ 89-1-67. Conveyance by administrator, executor, guardian, master, or commissioner.

A conveyance by an administrator, executor, guardian, master, or commissioner, who may sell land under a decree of court may be in the following form, and shall be effective to convey all that could or would be conveyed in such case by any form of conveyance, viz.:

"By virtue of the authority conferred on me, administrator of the estate of ________, deceased, by the decree of the chancery court of ________ county, rendered on the ________ day of ________ confirming a sale made on the ________ day of ________, in pursuance of a decree of said court rendered on the ________ day of ________, I, as administrator of said estate, in consideration of ________ dollars, convey to ________, the purchaser thereof, the following land, to wit: [here describe the land].

"Witness my signature, the ________ day of ________, A. D. ________

____________________"

The description of the character of the maker of the conveyance will vary the form according to the fact. And if a conveyance be made in pursuance of a power conferred by a will, and not by virtue of a decree, the will should be referred to as a source of power, instead of a decree.

SOURCES: Codes, 1880, § 1242; 1892, § 2486; 1906, § 2823; Hemingway's 1917, § 2324; 1930, § 2134; 1942, § 855.

Cross References — Indexing of conveyances by persons acting in an official or representative character, see § 89-5-35.

Sale of land and deeds of conveyance by executors and administrators, see §§ 91-7-221, 91-7-223.

Sale or compromise of claims by executors or administrators, see § 91-7-229.

Sale of real estate by guardian for maintenance and education of ward, see § 93-13-35.

Improvements by guardian of ward's land, or conversion by ward of land into money, see § 93-13-45.

Extension or renewal of encumbrances on estate by guardian, see § 93-13-47.

Sale of land by guardian for interest of ward, see § 93-13-51.

JUDICIAL DECISIONS

1. In general.

As a general rule, in this state a power in a will to sell real estate will not be construed as a power to mortgage. Stokes v. Payne, Kennedy & Co., 58 Miss. 614, 38 Am. R. 340 (1881).

It is always a question of intention whether or not an instrument be an execution of a power. Yates v. Clark, 56 Miss. 212 (1878).

§ 89-1-69. Prohibition against covenants requiring payment of a fee upon the transfer of real property; exception.

(1) In this section, "property owners' association" means an incorporated or unincorporated association that:

(a) Is designated as the representative of the owners of property in a subdivision;

(b) Has a membership primarily consisting of the owners of the property covered by the dedicatory instrument for the subdivision; and

(c) Manages or regulates the subdivision for the benefit of the owners of property in the subdivision.

(2) A deed restriction or other covenant running with the land applicable to the conveyance of real property that requires a transferee of real property or the transferee's heirs, successors, or assigns to pay a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property a fee in connection with a future transfer of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable. For purposes of this section, a conveyance of real property includes a conveyance or other transfer of an interest or estate in real property.

(3) This section does not apply to a deed restriction or other covenant running with the land that requires a fee associated with the conveyance of property in a subdivision that is payable to:

(a) A property owners' association that manages or regulates the subdivision or the association's managing agent if the subdivision contains more than one (1) platted lot;

(b) An entity organized under Section 501(c)(3), Internal Revenue Code of 1986; or

(c) A governmental entity.

SOURCES: Laws, 2010, ch. 348, § 1; Laws, 2011, ch. 344, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment deleted "residential" preceding "subdivision" in (1)(a) and (b); and deleted "residential" preceding "real property" three times in (2).

Federal Aspects — Section 501(c)(3) of the Internal Revenue Code is codified as 26 USCS § 501(c)(3).

RELIEF FROM INEQUITABLE MORTGAGE FORECLOSURES, EXECUTION SALES AND THE LIKE AFTER DECLARED EMERGENCY OR DISASTER

SEC.

89-1-301. Preliminary injunction against foreclosure proceedings; application to dissolve.
89-1-303. Hearing; determination of carrying charge payments.
89-1-305. Effect of default; explanation and remedy; revocation of extension on final order of sale due to changed circumstances.
89-1-307. Reference to master, farm debt adjustment committee or similar agency.
89-1-309. Suspension of statute of limitations.
89-1-311. Application to levies and advertisements for sale.
89-1-313. Auxiliary jurisdiction of court.
89-1-315. Approval of compromise settlements or compositions of mortgage indebtedness.
89-1-317. Agreements as to interest or finance charges; right to prepay without penalty.
89-1-319. Suspension of inconsistent laws; application to renewed or extended mortgages.
89-1-321. Construction of terms.
89-1-323. Exclusion of mortgages held by United States and mortgages securing payment of public debts or funds.
89-1-325. Postponement or extension shall not substantially diminish value of contract or obligation.
89-1-327. Provisions are severable.
89-1-329. Expiration of relief.

§ 89-1-301. Preliminary injunction against foreclosure proceedings; application to dissolve.

The provisions of Sections 89-1-301 through 89-1-329 shall apply only in the event that the President of the United States has declared that an emergency or major disaster exists in this state and shall apply only to persons or property directly damaged in an enemy attack, or a man-made, technological or natural disaster declared by the governor in which Sections 89-1-301 through 89-1-329 was specifically included as a relief measure for those counties covered by such disaster declaration. The provisions of Sections 89-1-301 through 89-1-329 shall apply to any mortgage or deed of trust on real property executed prior to the date of the disaster declaration by the governor, and to any such instruments executed after the date of the disaster declaration by the governor which renewed or extended any mortgage or deed of trust executed prior to the date of the disaster declaration by the governor. When the mortgagee, or owner, or holder, or trustee, or other person having like power shall hereafter determine to foreclose a mortgage or deed of trust on real estate covered by the provisions of Sections 89-1-301 through 89-1-329, he may proceed by bill in chancery, and in the same manner as in proceedings to foreclose under existing statutes in cases where the mortgage or deed of trust contains no provisions for sale by a trustee or otherwise. Any stipulations in the mortgage or deed of trust as to the manner of foreclosure thereunder shall not preclude proceedings to foreclose any mortgage or deed of trust under the provisions of Sections 89-1-301 through 89-1-329. If any mortgagee, holder, owner, trustee, or other person shall attempt to foreclose otherwise than as herein provided, such proceedings may be enjoined by the mortgagor or owner in possessing of the mortgaged premises, or anyone claiming under the mortgagor, or anyone liable for the mortgage debt. Upon the filing of a sworn petition which affirmatively sets forth that neither the petitioner nor any other person owning an interest in the legal title to the mortgaged premises is able to pay the sums in arrears on the mortgaged debt, that no such person or persons have been able to secure a refinancing of the mortgaged debt up to the date of the filing of the petition, after diligent effort, and that because of the destruction of or damage to improvements on the mortgaged premises or because of economic conditions brought about by the effects of such an enemy attack or man-made, technological or natural disaster declared by the governor, the mortgaged property has depreciated in value as a proximate result of said disaster in an amount in excess of fifteen percent (15%) of its fair market value prior to said disaster, the chancellor of any chancery court of competent jurisdiction shall issue a preliminary injunction enjoining any foreclosure proceedings which have been commenced. The chancellor shall likewise issue a preliminary injunction enjoining any foreclosure proceedings which have been commenced if a sworn petition shall be filed which affirmatively sets forth that as a direct and proximate result of said disaster the petitioner or any other person owning an interest in the legal title to the mortgaged premises is unable to pay the sums in arrears on the mortgage debt, that the petitioner or such other person or persons have not been able to secure the refinancing of the mortgage debt up to the date of the filing of the petition after diligent effort, and that the petitioner has actually sustained a loss in income derived from the mortgaged property, or is presently threatened with such loss as a proximate result of such disaster, in an amount in excess of fifteen percent (15%) of the average annual income from the mortgaged property for the three (3) years immediately prior to said disaster; provided, however, for mortgages or deeds of trust on real property leased or rented for residential purposes from the mortgagor to a third party or parties, the provisions of Sections 89-1-301 through 89-1-329 shall apply only if the mortgagor or landlord has made or is making a good-faith effort to rehabilitate the property to a reasonable standard of habitability.

Upon the issuance of any such preliminary injunction, the mortgagee may file a motion to dissolve said injunction, which motion shall be heard in termtime or in vacation, at a time to be fixed by the court not less than thirty (30) days from the date of the filing thereof. The mortgagor may implead any and all persons owning or claiming an interest in the legal title to said property and all persons who may be primarily or secondarily liable on the mortgaged indebtedness. Process shall be issued for all parties so impleaded in the manner now provided by law in suits to confirm titles and the cause shall be triable five (5) days after completion of service of process on all parties. The court may grant such continuances as may be necessary for the completion of service of process on all parties.

Upon the hearing of the motion to dissolve, unless the petitioner shall prove all of the material allegations of his petition by a preponderance of the evidence, the preliminary injunction shall be dissolved. No injunction bond shall be required for the issuance of the preliminary injunction. If the court shall find the petition was filed solely for the purpose of hindering and delaying collection of the mortgaged debt and without reasonable grounds therefor, reasonable attorney's fees shall be allowed as in other cases upon dissolution of preliminary injunctions, but not otherwise.

If, upon hearing of the motion to dissolve, it shall be determined that said motion should not be granted, then the hearing shall continue in the same manner as provided for in Section 89-1-303, and the court shall enter its order granting the relief provided for by Sections 89-1-301 through 89-1-329 in the case of bills to foreclose. All the terms and provisions of Sections 89-1-301 through 89-1-329 relating to the proceedings had on, or to relief granted under, bills to foreclose shall be applicable.

Provided, however, if a deed of trust be foreclosed according to the provisions therein contained, and the sale be actually consummated without the mortgagor or his heirs or assigns availing themselves of the right to enjoin said sale as provided in Sections 89-1-301 through 89-1-329, the foreclosure and the title resting thereon, if otherwise regular, shall not be controverted on account of any of the provisions of Sections 89-1-301 through 89-1-329, and this limitation shall also apply to minors and all others under legal disability. The provisions of this section shall apply to advertisements for sales already published at the time of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, but in which the sale has not been made; provided that in such case the costs of the advertisement be tendered in cash with the bill for injunction.

SOURCES: Laws, 1980, ch. 371, § 1, eff from and after passage (approved April 25, 1980).

Cross References — Emergency management law, see §§ 33-15-1 et seq.

Sale of land under mortgage or deed of trust, see §§ 89-1-55, 89-1-57.

JUDICIAL DECISIONS

3. Chancery court.

Creditor was not obligated to bring a foreclosure proceeding in the chancery court because the foreclosure took place four months before Hurricane Katrina and six months before the protections of the Relief from Inequitable Mortgage Foreclosures, Execution Sales, and the Like after Declared Emergency or Disaster Act, Miss. Code Ann. §§ 89-1-301 through 89-1-329 were invoked. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 13 Am. Jur. Legal Forms 2d, Mortgages § 179:457.1.

§ 89-1-303. Hearing; determination of carrying charge payments.

Suits for the foreclosure of mortgages and deeds of trust shall be deemed ready for final hearing at any time after the expiration of thirty (30) days from the completion of the service of legal process on all parties. On the hearing, the court or chancellor in vacation shall receive evidence tending to establish the reasonable, normal, actual value of the mortgaged property, may fix a minimum price or reasonable and equitable price thereon, and shall determine the reasonable value of the income on said property, if any. If it has no income, then the court or chancellor in vacation shall determine the reasonable rental value, and in lieu of a present order of sale shall direct and require the mortgagor or those interested therein to pay all or a reasonable part of said income or rental value to be used for the payment of taxes, insurance and interest on the mortgage indebtedness, together with a reasonable sum for the upkeep of said property. Said payments shall be made at such times and in such manner as shall be fixed and determined and ordered by the court or chancellor in vacation which, according to the circumstances, may appear just and equitable for a term not to extend beyond two (2) years from the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329. After the expiration of two (2) years from the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, if any past due principal, interest, taxes and the like have not been paid, a final order for sale may be made.

SOURCES: Laws, 1980, ch. 371, § 2, eff from and after passage (approved April 25, 1980).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds § 179:282 (waiver of valuation and appraisement of borrower under trust deed).

§ 89-1-305. Effect of default; explanation and remedy; revocation of extension on final order of sale due to changed circumstances.

If the mortgagor or owner of the mortgaged premises, or other interested person for whose relief Sections 89-1-301 through 89-1-329 are enacted, shall make default in the carrying charge payments, or any of them, required in the order mentioned in the foregoing section, or shall commit any waste, his or her right to a further postponement of a final sale shall terminate thirty (30) days after such default, and the mortgagee or trustee or other persons having the right to foreclose shall thereupon be entitled to apply to the court in termtime or vacation for a final decree of sale upon a satisfactory showing to the court that the default aforesaid has occurred; provided that if the default be explained on the grounds of casualty, inevitable accident, or other good reason wholly beyond the control of the defaulter, and be one which in the judgment of the court can be remedied and made good by the defaulter within a reasonably short period to be fixed by the court, then the court or chancellor in vacation shall have power to excuse the default and to make such order in reference thereto as may be just and equitable. The chancellor shall have power in vacation, at any time after the period mentioned in Section 89-1-303, to hear and determine and to order or decree in respect to any matter that shall arise under Sections 89-1-301 through 89-1-329, to the same extent and as fully as the court could do in termtime, legal notice having been given to all parties of the said hearing in vacation. The court or chancellor in vacation shall have power to revoke the period of extension theretofore granted for the making of the final order of sale in case it may be made to appear to the chancellor in vacation, or to the court in termtime, that the occasion for said postponement no longer exists or is no longer just and reasonable; and, in general, the court, or chancellor in vacation, shall have power to alter and revise its orders theretofore made in any respect insofar as the changed circumstances and conditions may require. Provided further, that prior to two (2) years from the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, no action shall be maintained in this state for a deficiency judgment until the period of time extension allowed in any proceeding begun under the provisions of Sections 89-1-301 through 89-1-329 shall have expired.

SOURCES: Laws, 1980, ch. 371, § 3, eff from and after passage (approved April 25, 1980).

Cross References — Sale of land under mortgage or deed of trust, see §§ 89-1-55, 89-1-57.

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

Am Jur. 13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds §§ 179:262, 179:263 (default provisions; remedies on default); §§ 179:400, 179:400.1 (covenant against waste).

28 Am. Jur. Trials 229, Slander of Title by Improper Recording of Notice of Default.

§ 89-1-307. Reference to master, farm debt adjustment committee or similar agency.

At any hearing, whether in termtime or in vacation, the chancellor shall have power to refer any issue or issues arising under the proceedings authorized by Sections 89-1-301 through 89-1-329 to a master in chancery or to the local farm debt adjustment committee, or any similar federal or state agency, and may prescribe the time within which the master or agency aforesaid shall report. The chancellor shall give consideration to such report with or without exceptions as in his judgment and discretion the same may be entitled.

SOURCES: Laws, 1980, ch. 371, § 4, eff from and after passage (approved April 25, 1980).

§ 89-1-309. Suspension of statute of limitations.

The statutes of limitation which would otherwise apply to any mortgage or mortgage debt, or to any other cause of action under Sections 89-1-301 through 89-1-329, shall cease to run upon the filing of any legal pleadings in the aforesaid court; and the period during which the same be pending in court under Sections 89-1-301 through 89-1-329 shall be added to the period of statutory limitations which would apply to said debt or mortgage or other obligation in which the cause of action arose.

SOURCES: Laws, 1980, ch. 371, § 5, eff from and after passage (approved April 25, 1980).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

§ 89-1-311. Application to levies and advertisements for sale.

The provisions of Sections 89-1-301 through 89-1-329 shall apply to levies and advertisements for sales under executions, including those under deficiency judgments or decrees where the judgment, decree or account sued on existed prior to the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329; and when an advertisement has been made for a sale under any execution, the judgment debtor or any person interested in the real property levied upon may enjoin the sale under execution, whereupon the plaintiff in execution shall proceed to enforce the same by a cross-bill or by original bill in the same manner as if the plaintiff in execution were the holder of a mortgage.

When an original bill has been filed in response to a bill of injunction under Sections 89-1-301 through 89-1-329, the causes may be consolidated for the hearing and for all subsequent proceedings, save as to the pleadings and process.

SOURCES: Laws, 1980, ch. 371, § 6, eff from and after passage (approved April 25, 1980).

Cross References — Sale of land under mortgage or deed of trust, see §§ 89-1-55, 89-1-57.

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

§ 89-1-313. Auxiliary jurisdiction of court.

The court shall have jurisdiction to postpone the enforcement of judgment by execution sale or to order resale or give relief where such judgment is rendered in an action to collect a debt or obligation secured by a real estate mortgage, the foreclosure of which might be affected under the terms of Sections 89-1-301 through 89-1-329.

SOURCES: Laws, 1980, ch. 371, § 7, eff from and after passage (approved April 25, 1980).

RESEARCH REFERENCES

ALR. Mortgage foreclosure forbearance statutes-modern status. 83 A.L.R.4th 243.

§ 89-1-315. Approval of compromise settlements or compositions of mortgage indebtedness.

In case the parties to any such foreclosure action shall agree in writing upon terms of compromise settlement thereof, or of composition of the mortgage indebtedness, or both, the court shall have jurisdiction and may by its order confirm and approve such settlement or composition, or both, as the case may be.

SOURCES: Laws, 1980, ch. 371, § 8, eff from and after passage (approved April 25, 1980).

§ 89-1-317. Agreements as to interest or finance charges; right to prepay without penalty.

In any modification or refinancing of a debt secured by a mortgage or deed of trust on real property subject to Sections 89-1-301 through 89-1-329, the borrower and lender may contract and agree that all or any part of the accrued interest or interest to accrue or earned finance charge which has not been paid on the existing debt may be added to the unpaid principal balance thereof, and the borrower may contract for and agree to pay interest on the principal balance as modified as otherwise provided by law; provided, any such borrower shall have the right to prepay the original balance or the modified balance of the debt without penalty.

SOURCES: Laws, 1980, ch. 371, § 9, eff from and after passage (approved April 25, 1980).

RESEARCH REFERENCES

ALR. Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time. 81 A.L.R.4th 423.

§ 89-1-319. Suspension of inconsistent laws; application to renewed or extended mortgages.

Every law and all the provisions thereof now in force insofar as inconsistent with the provisions of Sections 89-1-301 through 89-1-329 are hereby suspended for two (2) years from the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329. No postponement of sale shall be ordered or allowed under Sections 89-1-301 through 89-1-329 which would have the effect of extending the period for redemption beyond two (2) years from the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329.

Sections 89-1-301 through 89-1-329, as to mortgage foreclosure, shall apply only to mortgages made prior to the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, but shall not apply to mortgages made prior to the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, which shall hereafter be renewed or extended for: (a) a period ending more than one (1) year after the date of the disaster declaration by the governor in which he specifically included the relief provided for in Sections 89-1-301 through 89-1-329, or (b) which shall be extended by agreement so as to be payable in monthly installments extending over a period of more than three (3) years. During the period of time of postponement granted under the terms of Sections 89-1-301 through 89-1-329 the several statutes of limitation be and they are hereby suspended insofar as any right or obligation may be affected by Sections 89-1-301 through 89-1-329.

SOURCES: Laws, 1980, ch. 371, § 10, eff from and after passage (approved April 25, 1980).

Cross References — Constitutional direction for sale of lands under decree of court, see MS Const Art. 4, § 111.

Sale of realty by court decree, see § 11-5-93.
Procedure for making sales under execution, see §§ 13-3-161 et seq.
Limitation of actions for property sold by order of court, see § 15-1-37.
Conveyances for lands sold under decree of court, see § 89-1-27.
Procedure for selling lands under mortgages and deeds of trust, see § 89-1-55.

§ 89-1-321. Construction of terms.

The words "mortgagor," "mortgagee," "judgment creditor," "judgment debtor" and "purchaser," whenever used in Sections 89-1-301 through 89-1-329, shall be construed to include the plural as well as the singular and also to include their personal representatives, successors and assigns, and the word "mortgage" shall be construed to include deeds of trust and vendors' liens; and for purposes of Sections 89-1-301 through 89-1-329, deeds of trust and any instrument executed as security for an indebtedness shall be treated as a mortgage.

SOURCES: Laws, 1980, ch. 371, § 11, eff from and after passage (approved April 25, 1980).

§ 89-1-323. Exclusion of mortgages held by United States and mortgages securing payment of public debts or funds.

The provisions of Sections 89-1-301 through 89-1-329 shall not apply to any mortgage while such mortgage is held by the United States or agency thereof as security or pledge of the maker, its successors or assigns, nor shall the provisions of Sections 89-1-301 through 89-1-329 apply to any mortgage held as security or pledge to secure payment of a public debt or to secure payment of the deposit of public funds.

SOURCES: Laws, 1980, ch. 371, § 12, eff from and after passage (approved April 25, 1980).

§ 89-1-325. Postponement or extension shall not substantially diminish value of contract or obligation.

No postponement or extension shall be ordered under conditions which, under the temporary emergency, would substantially diminish or impair the value of the contract or obligation of the person against whom the relief is sought without reasonable allowance to justify the exercise of the police power hereby authorized.

SOURCES: Laws, 1980, ch. 371, § 13, eff from and after passage (approved April 25, 1980).

§ 89-1-327. Provisions are severable.

The provisions of Sections 89-1-301 through 89-1-329 are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect, impair or abrogate any of the remaining provisions, but the remaining provisions thereof shall be and remain in full force and effect without regard to that phrase, clause or portion invalidated.

SOURCES: Laws, 1980, ch. 371, § 14, eff from and after passage (approved April 25, 1980).

§ 89-1-329. Expiration of relief.

Except for the cases pending in court, the relief provided for in Sections 89-1-301 through 89-1-329 shall expire two (2) years from the date of any disaster declaration by the governor in which Sections 89-1-301 through 89-1-329 were specifically included as a relief measure for those counties covered by such disaster declaration.

SOURCES: Laws, 1980, ch. 371, § 15, eff from and after passage (approved April 25, 1980).

REAL ESTATE TRANSFER DISCLOSURE REQUIREMENTS

SEC.
89-1-501. Applicability of real estate transfer disclosure requirement provisions.
89-1-503. Delivery of written statement required; indication of compliance; right of transferee to terminate for late delivery.
89-1-505. Limit on duties and liabilities with respect to information required or delivered.
89-1-507. Approximation of certain information required to be disclosed; information subsequently rendered inaccurate.
89-1-509. Form of seller's disclosure statement.
89-1-511. Disclosures to be made in good faith.
89-1-513. Provisions not exhaustive of items to be disclosed.
89-1-515. Amendment of disclosure.
89-1-517. Delivery of disclosure.
89-1-519. Agent; extent of agency.
89-1-521. Delivery of disclosure where more than one agent; inability of delivering broker to obtain disclosure document; notification to transferee of right to disclosure.
89-1-523. Noncompliance with disclosure requirements not to invalidate transfer; liability for actual damages.
89-1-525. Enforcement by Mississippi Real Estate Commission.
89-1-527. Failure to disclose nonmaterial fact regarding property as site of death or felony crime, as site of act or occurrence having no effect on physical condition of property, or as being owned or occupied by persons affected or exposed to certain diseases; failure to disclose information provided or maintained on registration of sex offenders.

§ 89-1-501. Applicability of real estate transfer disclosure requirement provisions.

(1) The provisions of Sections 89-1-501 through 89-1-523 apply only with respect to transfers by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase or ground lease

coupled with improvements, of real property on which a dwelling unit is located, or residential stock cooperative improved with or consisting of not less than one (1) nor more than four (4) dwelling units, when the execution of such transfers is by, or with the aid of, a duly licensed real estate broker or salesperson.

(2) There are specifically excluded from the provisions of Sections 89-1-501 through 89-1-523:

(a) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(b) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

(c) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship or trust.

(d) Transfers from one co-owner to one or more other co-owners.

(e) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

(f) Transfers between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree.

(g) Transfers or exchanges to or from any governmental entity.

(h) Transfers of real property on which no dwelling is located.

(i) The provisions of Section 89-1-527.

SOURCES: Laws, 1993, ch. 407, § 1; Laws, 1997, ch. 456, § 1; Laws, 2005, ch. 329, § 2, eff from and after July 1, 2005.

JUDICIAL DECISIONS

1. Illustrative cases.

Where the home seller had submitted two disclosure statements before his death, the first one with a listing agency in which the seller admitted that his home had been treated for termite damages, and the second one with the realtor in which the seller denied that his home had been treated for prior termite damage, summary judgment in favor of a realtor was proper as the home buyers failed to show that the realty possessed any prior knowledge of any problems with the seller's memory or his home which would have triggered a duty to investigate the credibility of the seller's denial of prior termite damage in his disclosure statement. Varnado v. Alfonso Realty, Inc., 16 So. 3d 746 (Miss. Ct. App. 2009).

Summary judgment was appropriate against an action brought by the buyers of a home for failure to make the statutory disclosures required under Miss. Code Ann. §§ 89-1-501 to 523, fraud and related claims where the home was 30 years old, had obvious structural problems, the buyers were made aware of the existence of subterranean termite damage, and a contract addendum indicated that the home was being sold "as is". Laird v. ERA Bayshore Realty, 841 So. 2d 178 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR. Real-estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property. 58 A.L.R.2d 10.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations. 61 A.L.R.2d 1237.

Liability of vendor of structure for failure to disclose that it was built on filled ground. 80 A.L.R.2d 1453.

Duty of vendor of real estate to give purchaser information as to termite infestation. 22 A.L.R.3d 972.

Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission. 50 A.L.R.3d 1188.

Real estate broker's liability for misrepresentation as to income from or productivity of property. 81 A.L.R.3d 717.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 A.L.R.3d 568.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability. 12 A.L.R.4th 866.

Liability of vendor of existing structure for property damage sustained by purchaser after transfer. 18 A.L.R.4th 1168.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation. 19 A.L.R.4th 801.

Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased. 32 A.L.R.4th 828.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property. 71 A.L.R.4th 511.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

37 Am. Jur. 2d, Fraud and Deceit §§ 169, 218.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

24 Am. Jur. Pl & Pr Forms (Rev), Vendor and Purchaser, Forms 59, 113 et seq. (complaint, petition or declaration-for rescission or for damages for fraud-nondisclosure or particular misrepresentations as to condition of realty).

15C Am. Jur. Legal Forms 2d, Real Estate Sales , Forms 1 et seq.

12 Am. Jur. Proof of Facts 2d 103, Vendor's Failure to Warn Purchaser of Dangerous Location of Property.

16 Am. Jur. Proof of Facts 2d 719, Real Estate Broker's Misrepresentation of Condition or Value of Realty.

38 Am. Jur. Proof of Facts 2d 91, Fraudulent Misrepresentation as to Use to Which Real Property Could Be Put.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-503. Delivery of written statement required; indication of compliance; right of transferee to terminate for late delivery.

The transferor of any real property subject to Sections 89-1-501 through 89-1-523 shall deliver to the prospective transferee the written property condition disclosure statement required by Sections 89-1-501 through 89-1-523, as follows:

(a) In the case of a sale, as soon as practicable before transfer of title.

(b) In the case of transfer by a real property sales contract, or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract. For the purpose of this paragraph, execution means the making or acceptance of an offer.

With respect to any transfer subject to paragraph (a) or (b), the transferor shall indicate compliance with Sections 89-1-501 through 89-1-523 either on the receipt for deposit, the real property sales contract, the lease, or any addendum attached thereto or on a separate document.

If any disclosure, or any material amendment of any disclosure, required to be made by Section 89-1-501 through 89-1-523, is delivered after the execution of an offer to purchase, the transferee shall have three (3) days after delivery in person or five (5) days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent.

SOURCES: Laws, 1993, ch. 407, § 2; Laws, 2002, ch. 512, § 17, eff from and after July 1, 2002.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section as amended by Laws of 2002, ch. 512, § 17. The words "this act" in the next to last paragraph were changed to "Sections 89-1-501 through 89-1-523." The Joint Committee ratified the correction at its May 16, 2002, meeting.

Cross References — Amendment of any disclosure made pursuant to §§ 89-1-501 through 89-1-523 must follow provisions of this section, see § 89-1-515.

RESEARCH REFERENCES

ALR. Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations. 61 A.L.R.2d 1237.

Liability of vendor of structure for failure to disclose that it was built on filled ground. 80 A.L.R.2d 1453.

Duty of vendor of real estate to give purchaser information as to termite infestation. 22 A.L.R.3d 972.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 A.L.R.3d 568.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property. 71 A.L.R.4th 511.

Real-estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property. 58 A.L.R.2d 10.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

24 Am. Jur. Pl & Pr Forms (Rev), Vendor and Purchaser, Forms 59, 113 et seq. (complaint, petition or declaration-for rescission or for damages for fraud-nondisclosure or particular misrepresentations as to condition of realty).

16 Am. Jur. Proof of Facts 2d 719, Real Estate Broker's Misrepresentation of Condition or Value of Realty.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-505. Limit on duties and liabilities with respect to information required or delivered.

(1) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy or omission of any information delivered pursuant to Sections 89-1-501 through 89-1-523 if the error, inaccuracy or omission was not within the personal knowledge of the transferor or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in subsection (2) that is required to be disclosed pursuant to Sections 89-1-501 through 89-1-523, and ordinary care was exercised in obtaining and transmitting it.

(2) The delivery of any information required to be disclosed by Sections 89-1-501 through 89-1-523 to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to Sections 89-1-501 through 89-1-523 shall be deemed to comply with the requirements of Sections 89-1-501 through 89-1-523 and shall relieve the transferor or any listing or selling agent of any further duty under Sections 89-1-501 through 89-1-523 with respect to that item of information.

(3) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subsection (1) if the information is provided to the prospective transferee pursuant to a request therefor, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 89-1-509 and, if so, shall indicate the required disclosures, or parts thereof, to which the information being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

SOURCES: Laws, 1993, ch. 407, § 3, eff from and after July 1, 1993.

JUDICIAL DECISIONS

1.-2. [Reserved for future use.]
3. Dismissal proper.

1.-2. [Reserved for future use.]

3. Dismissal proper.

Summary judgment and dismissal of the home buyers' suit against the home sellers (in which they contended the sellers intentionally misrepresented the condition of the property) was proper as the buyers offered no evidence that the sellers intentionally misrepresented the condition of their property, or that the sellers had any personal knowledge of the conditions discovered by the buyers subsequent to their purchase. Additionally, the buyers hired their own licensed inspector prior to the closing of sale, and pursuant to his recommendations, the buyers were apparently satisfied enough with the conditions of the property to follow through with the contract and purchase the property. Williams v. Estate of Morrison, 969 So. 2d 132 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-507. Approximation of certain information required to be disclosed; information subsequently rendered inaccurate.

If information disclosed in accordance with Sections 89-1-501 through 89-1-523 is subsequently rendered inaccurate as a result of any act, occurrence or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of Sections 89-1-501 through 89-1-523. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the best information available to the transferor or his agent, and is not used for the purpose of circumventing or evading Sections 89-1-501 through 89-1-523.

SOURCES: Laws, 1993, ch. 407, § 4, eff from and after July 1, 1993.

RESEARCH REFERENCES

ALR. Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers § 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-509. Form of seller's disclosure statement.

The disclosures required by Sections 89-1-501 through 89-1-523 pertaining to the property proposed to be transferred shall be set forth in, and shall be made on a copy of a disclosure form, the structure and composition of which shall be determined by the Mississippi Real Estate Commission.

SOURCES: Laws, 1993, ch. 407, § 5; Laws, 1997, ch. 456, § 2; Laws, 1999, ch. 588, § 4, eff from and after Jan. 1, 2000.

Cross References — Mississippi Real Estate Commission, see § 73-35-5.

Information provided avowedly in fulfillment of this section as relieving expert of responsibility with respect to any information other than that set forth, see § 89-1-505.

RESEARCH REFERENCES

ALR. Vendor's obligation to disclose to purchaser of land presence of contamination from hazardous substances or wastes. 12 A.L.R.5th 630.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-511. Disclosures to be made in good faith.

Each disclosure required by Sections 89-1-501 through 89-1-523 and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of Sections 89-1-501 through 89-1-523, "good faith" means honesty in fact in the conduct of the transaction.

SOURCES: Laws, 1993, ch. 407, § 6, eff from and after July 1, 1993.

RESEARCH REFERENCES

ALR. Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-513. Provisions not exhaustive of items to be disclosed.

The specification of items for disclosure in Sections 89-1-501 through 89-1-523 does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation or deceit in the transfer transaction.

SOURCES: Laws, 1993, ch. 407, § 7, eff from and after July 1, 1993.

RESEARCH REFERENCES

ALR. Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-515. Amendment of disclosure.

Any disclosure made pursuant to Sections 89-1-501 through 89-1-523 may be amended in writing by the transferor or his agent, but the amendment shall be subject to the provisions of Section 89-1-503.

SOURCES: Laws, 1993, ch. 407, § 8, eff from and after July 1, 1993.

RESEARCH REFERENCES

ALR. Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 12 C.J.S., Brokers §§ 165, 166.

92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-517. Delivery of disclosure.

Delivery of disclosure required by Sections 89-1-501 through 89-1-523 shall be by personal delivery to the transferee or by mail to the prospective transferee. For the purposes of Sections 89-1-501 through 89-1-523, delivery to the spouse of a transferee shall be deemed delivery to the transferee, unless provided otherwise by contract.

SOURCES: Laws, 1993, ch. 407, § 9, eff from and after July 1, 1993.

§ 89-1-519. Agent; extent of agency.

Any person or entity, other than a duly licensed real estate broker or salesperson acting in the capacity of an escrow agent for the transfer of real property subject to Sections 89-1-501 through 89-1-523 shall not be deemed the agent of the transferor or transferee for purposes of the disclosure requirements of Sections 89-1-501 through 89-1-523, unless the person or entity is empowered to so act by an express written agreement to that effect. The extent of such an agency shall be governed by the written agreement.

SOURCES: Laws, 1993, ch. 407, § 10, eff from and after July 1, 1993.

RESEARCH REFERENCES

ALR. Real-estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property. 58 A.L.R.2d 10.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations. 61 A.L.R.2d 1237.

Real estate broker's liability for misrepresentation as to income from or productivity of property. 81 A.L.R.3d 717.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property. 71 A.L.R.4th 511.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

16 Am. Jur. Proof of Facts 2d 719, Real Estate Broker's Misrepresentation of Condition or Value of Realty.

CJS. 12 C.J.S., Brokers §§ 165, 166.

§ 89-1-521. Delivery of disclosure where more than one agent; inability of delivering broker to obtain disclosure document; notification to transferee of right to disclosure.

(1) If more than one (1) licensed real estate broker is acting as an agent in a transaction subject to Sections 89-1-501 through 89-1-523, the broker who has obtained the offer made by the transferee shall, except as otherwise provided in Sections 89-1-501 through 89-1-523, deliver the disclosure required by Sections 89-1-501 through 89-1-523 to the transferee, unless the transferor has given other written instructions for delivery.

(2) If a licensed real estate broker responsible for delivering the disclosures under this section cannot obtain the disclosure document required and does not have written assurance from the transferee that the disclosure has been received, the broker shall advise the transferee in writing of his rights to the disclosure. A licensed real estate broker responsible for delivering disclosures under this section shall maintain a record of the action taken to effect compliance.

SOURCES: Laws, 1993, ch. 407, § 11, eff from and after July 1, 1993.

JUDICIAL DECISIONS

1. Failure to deliver.

Finding against three real estate agents in the buyer's complaint alleging improper conduct was appropriate because the agents were unable to explain why their files had not been maintained as required by the Mississippi Real Estate Commission's regulations. Further, there was no evidence that the statement was delivered to the buyer as required by Mississippi Code Annotated section 89-1-521(l). Palmer v. Miss. Real Estate Comm'n, 14 So. 3d 67 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

ALR. Real-estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property. 58 A.L.R.2d 10.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations. 61 A.L.R.2d 1237.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property. 71 A.L.R.4th 511.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 88, 89, 92.

16 Am. Jur. Proof of Facts 2d 719, Real Estate Broker's Misrepresentation of Condition or Value of Realty.

CJS. 12 C.J.S., Brokers §§ 165, 166.

§ 89-1-523. Noncompliance with disclosure requirements not to invalidate transfer; liability for actual damages.

No transfer subject to Sections 89-1-501 through 89-1-523 shall be invalidated solely because of the failure of any person to comply with any provision of Sections 89-1-501 through 89-1-523. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of Sections 89-1-501 through 89-1-523 shall be liable in the amount of actual damages suffered by a transferee.

SOURCES: Laws, 1993, ch. 407, § 12, eff from and after July 1, 1993.

JUDICIAL DECISIONS

1. In general.

This section does not change the construction of an "as is" clause to mean "as disclosed." Crase v. Hahn, 754 So, 2d 471 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations. 61 A.L.R.2d 1237.

Liability of vendor of structure for failure to disclose that it was built on filled ground. 80 A.L.R.2d 1453.

Fraud predicated on vendor's misrepresentation or concealment of danger or possibility of flooding or other unfavorable water conditions. 90 A.L.R.3d 568.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability. 12 A.L.R.4th 866.

Liability of vendor of existing structure for property damage sustained by purchaser after transfer. 18 A.L.R.4th 1168.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation. 19 A.L.R.4th 801.

Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased. 32 A.L.R.4th 828.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property. 71 A.L.R.4th 511.

Real estate broker's liability for misrepresentation as to income from or productivity of property. 81 A.L.R.3d 717.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold. 46 A.L.R.4th 546.

Am Jur. 77 Am. Jur. 2d, Vendor and Purchaser §§ 278 et seq.

CJS. 92 C.J.S., Vendor and Purchaser §§ 106-110.

§ 89-1-525. Enforcement by Mississippi Real Estate Commission.

The Mississippi Real Estate Commission is authorized to enforce the provisions of Sections 89-1-501 through 89-1-523. Any violation of the provisions of Sections 89-1-501 through 89-1-523 shall be treated in the same manner as a violation of the Real Estate Broker License Law of 1954, Section 73-35-1 et seq., and shall be subject to same penalties as provided in that chapter.

SOURCES: Laws, 1997, ch. 456, § 3, eff from and after July 1, 1997.

Cross References — Real Estate Broker License Law of 1954, see §§ 73-35-1 et seq. Creation of Mississippi Real Estate Commission, see § 73-35-5.

§ 89-1-527. Failure to disclose nonmaterial fact regarding property as site of death or felony crime, as site of act or occurrence having no effect on physical condition of property, or as being owned or occupied by persons affected or exposed to certain diseases; failure to disclose information provided or maintained on registration of sex offenders.

(1) The fact or suspicion that real property is or was:

(a) The site of a natural death, suicide, homicide or felony crime (except for illegal drug activity that affects the physical condition of the property, its physical environment or the improvements located thereon);

(b) The site of an act or occurrence that had no effect on the physical condition of the property, its physical environment or the improvements located thereon;

(c) Owned or occupied by a person affected or exposed to any disease not known to be transmitted through common occupancy of real estate including, but not limited to, the human immunodeficiency virus (HIV) and the acquired immune deficiency syndrome (AIDS);

does not constitute a material fact that must be disclosed in a real estate transaction. A failure to disclose such nonmaterial facts or suspicions shall not give rise to a criminal, civil or administrative action against the owner of such real property, a licensed real estate broker or any affiliated licensee of the broker.

(2) A failure to disclose in any real estate transaction any information that is provided or maintained, or is required to be provided or maintained, in accordance with Section 45-33-21 through Section 45-33-57, shall not give rise to a cause of action against an owner of real property, a licensed real estate broker or any affiliated licensee of the broker. Likewise, no cause of action shall arise against any licensed real estate broker or affiliated licensee of the broker for revealing information to a seller or buyer of real estate in accordance with Section 45-33-21 through Section 45-33-57. Any factors related to this paragraph, if known to a property owner or licensee shall be disclosed if requested by a consumer.

(3) Failure to disclose any of the facts or suspicions of facts described in subsections (1) and (2) shall not be grounds for the termination or rescission of any transaction in which real property has been or will be transferred or leased. This provision does not preclude an action against an owner of real estate who makes intentional or fraudulent misrepresentations in response to a direct inquiry from a purchaser or prospective purchaser regarding facts or suspicions that are not material to the physical condition of the property including, but not limited to, those factors listed in subsections (1) and (2).

SOURCES: Laws, 2005, ch. 329, § 1, eff from and after July 1, 2005.

Cross References — Exclusion of this section from provisions of §§ 89-1-501 through 89-1-523, see § 89-1-501.

CHAPTER 2

Liability of Recreational Landowners

Article 1. Outdoor Recreational Land 89-2-1
Article 3. Limitation of Liability 89-2-21

ARTICLE 1.

OUTDOOR RECREATIONAL LAND.

SEC.
89-2-1. Declaration of purpose; effect of opening property for outdoor recreational purposes.
89-2-3. Definitions.
89-2-5. Certain liability not limited.
89-2-7. Application of chapter.

§ 89-2-1. Declaration of purpose; effect of opening property for outdoor recreational purposes.

The purpose of this chapter is to encourage persons to make available to the public land and water areas for outdoor recreational purposes. A lessee or owner who opens a land or water area to the public for outdoor recreational purposes shall not, by opening such land or water for such use:

(a) Be presumed to extend any assurance that such land or water area is safe for any purpose;

(b) Incur any duty of care toward a person who goes on the land or water area; or

(c) Become liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on the land or water area.

The foregoing applies, whether the person going on the land or water area is an invitee, licensee, trespasser or otherwise.

SOURCES: Laws, 1978, ch. 488, § 1(1), eff from and after July 1, 1978.

Cross References — Effect of landowner's permission to use land, see § 89-5-25. Exceptions to limitations of landowner's liability, see § 89-2-27.

RESEARCH REFERENCES

ALR. Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 A.L.R.4th 294.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 68 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 179.2 (answer, defense, plaintiff injured during recreational use of defendant's property, statutory defense).

§ 89-2-3. Definitions.

The term "outdoor recreational purposes" as used in this chapter shall include, but not necessarily be limited to, hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing and visiting historical, archaeological, scenic or scientific sites.

SOURCES: Laws, 1978, ch. 488, § 1(3), eff from and after July 1, 1978.

RESEARCH REFERENCES

ALR. Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 179.2 (answer, defense, plaintiff injured during recreational use of defendant's property, statutory defense).

§ 89-2-5. Certain liability not limited.

This chapter does not relieve any person of liability which would otherwise exist for deliberate, willful or malicious injury to persons or property. The provisions hereof shall not be deemed to create or increase the liability of any person.

SOURCES: Laws, 1978, ch. 488, § 1(2), eff from and after July 1, 1978.

RESEARCH REFERENCES

ALR. Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 A.L.R.4th 294.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 68 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 179.2 (answer, defense, plaintiff injured during recreational use of defendant's property, statutory defense).

§ 89-2-7. Application of chapter.

The provisions of this chapter shall not apply if any fee is charged for entering or using any part of such land or water outdoor recreational area, or if any concession is operated on said area offering to sell or selling any item or product to persons entering thereon for recreational purposes. Said chapter shall not apply unless public notice of the availability of such lands for such public use shall have been published once annually in a newspaper of general circulation in the county where such lands are situated.

SOURCES: Laws, 1978, ch. 488, § 2, eff from and after July 1, 1978.

JUDICIAL DECISIONS

1. In general.

Protection of § 89-2-1 is not available to landowner who made no attempt to comply with statutory notice provision contained in last sentence of § 89-2-7. Dumas v. Pike County, 642 F. Supp. 131 (S.D. Miss. 1986).

RESEARCH REFERENCES

ALR. Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 32 A.L.R.3d 508.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 68 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 179.2 (answer, defense, plaintiff injured during recreational use of defendant's property, statutory defense).

ARTICLE 3.

LIMITATION OF LIABILITY.

SEC.
89-2-21. Definitions.
89-2-23. Landowner's duty of care with respect to recreational users of land.
89-2-25. Effect of landowner's permission to use land.
89-2-27. Exceptions to limitation of liability.

§ 89-2-21. Definitions.

For the purposes of this article, the following words shall have the meanings ascribed herein, unless the context otherwise requires:

(a) "Land" or "premises" means all real property, waters and private ways, and all trees, buildings and structures which are located on such real property, waters and private ways.

(b) "Landowner" means the legal titleholder or owner of land or premises, and includes any lessee, occupant or any other person in control of such land or premises.

SOURCES: Laws, 1986, ch. 360, § 1, eff from and after July 1, 1986.

RESEARCH REFERENCES

ALR. Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 30, 31, 68 et seq., 72-76, 226.

CJS. 65 C.J.S., Negligence §§ 67 et seq., 76, 77et seq., 86 et seq.

§ 89-2-23. Landowner's duty of care with respect to recreational users of land.

Except as provided for in Section 89-2-27, a landowner: (a) shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, water sports, hiking or sightseeing; and (b) shall not be required to give any warning to any person entering on land or premises for hunting, fishing, trapping, camping, water sports, hiking or sightseeing as to any hazardous conditions or uses of, or hazardous structures or activities on such land or premises.

SOURCES: Laws, 1986, ch. 360, § 2, eff from and after July 1, 1986.

Cross References — Exceptions to limitations of liability, see § 89-2-27.

RESEARCH REFERENCES

ALR. Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity. 13 A.L.R.5th 600.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question. 11 A.L.R.3d 918.

Comment note.-Premises liability: Proceeding in the dark as contributory negligence. 22 A.L.R.3d 286.

Premises liability: Proceeding in the dark along outside path or walkway as contributory negligence. 22 A.L.R.3d 599.

Premises liability: Proceeding in the dark across exterior premises as contributory negligence. 23 A.L.R.3d 441.

Comment note.-Duty of possessor of land to warn child licensees of danger. 26 A.L.R.3d 317.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk. 35 A.L.R.3d 230.

Liability of owner or operator of trailer camp or park for injury or death from condition of premises. 41 A.L.R.3d 546.

Liability in connection with injury allegedly caused by defective condition of private road or driveway. 44 A.L.R.3d 355.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises. 48 A.L.R.3d 1027.

Attractive nuisance doctrine as applied to trees, shrubs, and the like. 59 A.L.R.3d 848.

Comment note.-Duty to take affirmative action to avoid injury to trespasser in position of peril through no fault of landowner. 70 A.L.R.3d 1125.

Liability for injuries in connection with ice or snow on nonresidential premises. 95 A.L.R.3d 15.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place. 21 A.L.R.4th 472.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 A.L.R.4th 294.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty. 30 A.L.R.4th 81.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Violation of governmental regulations as to conditions and facilities of swimming pools as affecting liability in negligence. 79 A.L.R.4th 461.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 30, 31, 68 et seq., 72-76, 226.

18A Am. Jur. Pl & Pr Forms (Rev), Negligence, Form 149.2 (Complaint, petition, or declaration-By family of decedent-Against owner of building where fatal shooting occurred).

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 115.1 (complaint by social guest injured by dive into shallow lake against lake owner and lakefront property owner).

48 Am. Jur. Proof of Facts 2d 275, Premises Liability: Willful or Wanton Conduct causing Injury to Entrant.

4 Am. Jur. Proof of Facts 3d 1, Swimming Pool Diving Injuries-Failure to Warn of Dangerous Condition.

CJS. 65 C.J.S., Negligence §§ 67 et seq., 76, 77et seq., 86 et seq.

§ 89-2-25. Effect of landowner's permission to use land.

Any landowner who gives permission to another person to hunt, fish, trap, camp, hike or sightsee upon land or premises shall not, by the sole act of giving such permission, be considered or construed to have:

(a) Extended any assurance that the premises are safe for such purposes;

(b) Caused the person to whom permission has been granted to be constituted the legal status of an invitee to whom a duty of care is owed; or

(c) Assumed responsibility or liability for any injury to such person or his property caused by any act of such person to whom permission has been granted, except as provided in Section 89-2-27.

SOURCES: Laws, 1986, ch. 360, § 3, eff from and after July 1, 1986.

Cross References — Exceptions to limitations of liability, see § 89-2-27.

RESEARCH REFERENCES

ALR. Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question. 11 A.L.R.3d 918.

Proceeding in the dark as contributory negligence. 22 A.L.R.3d 286.

Proceeding in the dark along outside path or walkway as contributory negligence. 22 A.L.R.3d 599.

Proceeding in the dark across exterior premises as contributory negligence. 23 A.L.R.3d 441.

Duty of possessor of land to warn child licensees of danger. 26 A.L.R.3d 317.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk. 35 A.L.R.3d 230.

Liability of owner or operator of trailer camp or park for injury or death from condition of premises. 41 A.L.R.3d 546.

Liability in connection with injury allegedly caused by defective condition of private road or driveway. 44 A.L.R.3d 355.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises. 48 A.L.R.3d 1027.

Attractive nuisance doctrine as applied to trees, shrubs, and the like. 59 A.L.R.3d 848.

Duty to take affirmative action to avoid injury to trespasser in position of peril through no fault of landowner. 70 A.L.R.3d 1125.

Liability for injuries in connection with ice or snow on nonresidential premises. 95 A.L.R.3d 15.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place. 21 A.L.R.4th 472.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 A.L.R.4th 294.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty. 30 A.L.R.4th 81.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 30, 31, 68 et seq., 72-76, 226.

20 Am. Jur. Pl & Pr Forms (Rev), Premises Liability, Form 115.1 (complaint by social guest injured by dive into shallow lake against lake owner and lakefront property owner).

CJS. 65 C.J.S., Negligence §§ 67 et seq., 76, 77 et seq., 86 et seq.

§ 89-2-27. Exceptions to limitation of liability.

This article shall not limit any liability which otherwise exists for:

(a) Willful or malicious failure to guard or warn against a hazardous condition, use, structure or activity;

(b) Injuries suffered in any case where permission to hunt, fish, trap, camp, hike, sightsee or engage in any other lawful activity was granted for a consideration other than the consideration, if any, paid to the landowner by the State of Mississippi, the federal government, or any other governmental agency; or

(c) Injuries to third persons or to persons to whom the landowner owed a duty to keep the land or premises safe or to warn of danger, which injuries were caused by acts of persons to whom permission to hunt, fish, camp, hike, sightsee or engage in any other lawful activity was granted.

SOURCES: Laws, 1986, ch. 360, § 4, eff from and after July 1, 1986.

Cross References — Limitation of a landowner's liability to recreational users of land, to which limitation this section provides exceptions, see §§ 89-2-23 and 89-2-25.

RESEARCH REFERENCES

ALR. Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity. 13 A.L.R.5th 600.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question. 11 A.L.R.3d 918.

Proceeding in the dark as contributory negligence. 22 A.L.R.3d 286.

Proceeding in the dark along outside path or walkway as contributory negligence. 22 A.L.R.3d 599.

Proceeding in the dark across exterior premises as contributory negligence. 23 A.L.R.3d 441.

Duty of possessor of land to warn child licensees of danger. 26 A.L.R.3d 317.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk. 35 A.L.R.3d 230.

Liability of owner or operator of trailer camp or park for injury or death from condition of premises. 41 A.L.R.3d 546.

Liability in connection with injury allegedly caused by defective condition of private road or driveway. 44 A.L.R.3d 355.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises. 48 A.L.R.3d 1027.

Attractive nuisance doctrine as applied to trees, shrubs, and the like. 59 A.L.R.3d 848.

Duty to take affirmative action to avoid injury to trespasser in position of peril through no fault of landowner. 70 A.L.R.3d 1125.

Liability for injuries in connection with ice or snow on nonresidential premises. 95 A.L.R.3d 15.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place. 21 A.L.R.4th 472.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser. 22 A.L.R.4th 294.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty. 30 A.L.R.4th 81.

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Am Jur. 62 Am. Jur. 2d, Premises Liability §§ 30, 31, 68 et seq., 72-76, 226.

4 Am. Jur. Proof of Facts 3d 1, Swimming Pool Diving Injuries-Failure to Warn of Dangerous Condition.

CJS. 65 C.J.S., Negligence §§ 67 et seq., 76, 77 et seq., 86 et seq.

CHAPTER 3

Acknowledgments

Sec.
89-3-1. Acknowledgment or proof necessary to recording.
89-3-3. Acknowledgment and proof.
89-3-5. Acknowledgments before commissioned officers of United States armed forces.
89-3-7. Forms of acknowledgment.
89-3-9. Acknowledgment or proof in another state.
89-3-11. Acknowledgment or proof in another state; construction and application as to prior acknowledgments.
89-3-13. Acknowledgment or proof in foreign country.
89-3-15. Grantor and witness dead or absent, how proved.

§ 89-3-1. Acknowledgment or proof necessary to recording.

(1) Except in cases governed by the Uniform Commercial Code, the provisions of Sections 89-5-101 through 89-5-113, or otherwise specially provided for by law, the execution of a written instrument of or concerning the sale of lands, whether the same be made for passing an estate of freehold or inheritance, or for a term of years, or for any other purpose, or any writing conveying personal estate, shall be acknowledged or proved, and the acknowledgment or proof duly certified by an officer competent to take the same in the manner directed by this chapter.

(2) Unless an instrument is acknowledged or proved as provided in subsection (1) of this section, the clerk's office may refuse to admit the instrument to record. However, if an instrument is not so acknowledged or proved but is otherwise admitted to record, then all persons shall be on constructive notice of the contents of the instrument.

(3) The provisions of subsection (2) of this section shall apply to all instruments of record on or after July 1, 2011. However, if the relative priorities of conflicting claims to real property were established before July 1, 2011, then the law applicable to those claims at the time those claims were established shall determine their priority.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (7); 1857, ch. 36, art. 25; 1871, § 2308; 1880, § 1215; 1892, § 2460; 1906, § 2793; Hemingway's 1917, § 2294; 1930, § 2135; 1942, § 856; Laws, 1966, ch. 316, § 10-105; Laws, 2011, ch. 364, § 8; Laws, 2011, ch. 538, § 2, eff from and after July 1, 2011.

Joint Legislative Committee Note — Section 8 of ch. 364, Laws of 2011, effective from and after July 1, 2011 (approved March 11, 2011), amended this section. Section 2 of ch. 538, Laws of 2011, effective July 1, 2011 (approved April 26, 2011), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 538, Laws of 2011, which contains language that specifically provides that it supersedes § 89-3-1 as amended by Laws of 2011, ch. 364.

Amendment Notes — The first 2011 amendment (ch. 364), inserted "the provisions of Sections 89-5-101 through 89-5-113" following "Except in cases governed by the Uniform Commercial Code."

The second 2011 amendment (ch. 538), rewrote (1); and added (2) and (3).

Cross References — Duty of chancery clerk to record instruments, see § 9-5-137.

Priority of security interests and fixtures, see § 75-9-313.

Place of filing in order to perfect security interest under Uniform Commercial Code, see § 75-9-501.

Recording of instruments generally, see § 89-5-1.

Recording of patents, whether acknowledged or not, see § 89-5-11.

Validity of deeds recorded for a 20 year period, see § 89-5-13.

Recording of wills, see §§ 91-7-31, 91-7-33.

Criminal offense of false certificate of acknowledgment or proof of deeds and other recordable instruments, see § 97-21-7.

JUDICIAL DECISIONS

1. In general.
2. Record of defectively acknowledged deed.

1. In general.

Recordation statute (§ 89-3-1) applies to any instrument affecting title to real property, including substitution of trustee. White v. Delta Found., Inc., 481 So. 2d 329 (Miss. 1985).

A deed with a defective acknowledgment was not eligible for recordation, and was not effective as to third parties, under § 89-3-1, but it was wholly effective between the parties to it. Cotton v. McConnell, 435 So. 2d 683 (Miss. 1983).

Certificate of acknowledgment of a deed is presumed to state the truth. Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969).

Delivery necessary to pass title. Lynch v. Lynch, 121 Miss. 752, 83 So. 807 (1920).

Presumption of delivery from record disappears upon showing of no delivery. Lynch v. Lynch, 121 Miss. 752, 83 So. 807 (1920).

Assignment of debt, though in form of deed of trust may be noted on deed of trust record. West v. Union Naval Stores Co., 116 Miss. 743, 77 So. 609 (1918), error overruled 117 Miss. 153, 77 So. 961 (1918).

Clerk not incompetent to take acknowledgment of bank's general assignment for creditors because indebted to bank. Dodwell v. Rieves, 114 Miss. 4, 74 So. 770 (1916).

A conveyance of personalty absolute on its face, and free from any trust, condition, or reservation, need not be recorded. Thomas v. Grand Gulf Bank, 17 Miss. (9 S. & M.) 201 (1848).

2. Record of defectively acknowledged deed.

Where a deed was first conveyed to a grandson by the decedent, then conveyed back to the estate, then conveyed to the grandson again by the executrix, but the executrix later sought to set aside the deed when the grandson died, notwithstanding the failure to have strictly followed form, the acknowledgment contained all the necessary information and, therefore, was not fatal to the deed's validity; furthermore, it was clear from the deed that the executrix was acting on behalf of the decedent, the grantor, and, thus, there was no ambiguity Estate of Dykes v. Estate of Williams, 864 So. 2d 926 (Miss. 2003).

In action arising from defendants' alleged negligence and misconduct in conducting substituted trustee's foreclosure sale, acknowledgment verifying that person who executed appointment of substituted trustee had, in fact, appeared before notary public and signed document was not fatally defective under § 89-3-1 due to notary's failure to fill in blank space provided for name of person who appeared before him and executed instrument, as such person's identity was readily ascertainable from appointment form itself. Morton v. Resolution Trust Corp., 918 F. Supp. 985 (S.D. Miss. 1995).

Where a warranty deed appeared to have been acknowledged and signed by the mark of a named grantor and the acknowledgment was notarized, but the notary public described the person who signed the deed as a person of altogether different description from that of the named grantor, the deed was properly canceled as a forgery. Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969).

A deed which is defectively acknowledged by reason of the fact that word "delivered" was omitted from acknowledgment is good as between the parties. Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948).

United States commissioner was not "judge of United States court" within statute authorizing judges of United States courts to acknowledge instruments to be recorded, and hence deed acknowledged by such commissioner was not entitled to be admitted to record in clerk's office. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

State, and not federal, statutes determine what officers are competent to take and certify acknowledgments which will entitle instruments to be admitted to record. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

Deed admitted to record without proper acknowledgment did not constitute constructive notice to subsequent purchasers for valuable consideration. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

Deed not notice to subsequent purchaser where acknowledgment defective so as not to entitle it to be recorded. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Am. Ann. Cas. 1913A,1081 (1910).

Deed not recordable if acknowledgment fail to show its delivery, and if recorded will not impart constructive notice of its existence. Ligon v. Barton, 88 Miss. 135, 40 So. 555 (1906).

An acknowledgment to a trust deed taken before an officer who is himself trustee therein, with power to sell to pay debts, is void and does not entitle the deed to be recorded. Holden v. Brimage, 72 Miss. 228, 18 So. 383 (1894).

Notwithstanding this section [Code 1942, § 856], if one takes a trust deed on land after having read on the record a prior trust deed on the property, though not properly acknowledged, he is not an innocent purchaser. Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

ATTORNEY GENERAL OPINIONS

Instruments concerning real property should be properly executed and acknowledged before being recorded. Robinson, Jan. 18, 2005, A.G. Op. 04-0612.

RESEARCH REFERENCES

ALR. Record of instrument without sufficient acknowledgment as notice. 59 A.L.R.2d 1299.

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws § 68.

1 Am. Jur. Pl & Pr Forms (Rev), Acknowledgments, Forms 1 et seq.

§ 89-3-3. Acknowledgment and proof.

Every conveyance, contract or agreement proper to be recorded, may be acknowledged or proved before any judge of a United States court, any judge of the supreme court, any judge of the circuit court, or any chancellor, or any judge of the county court, or before any clerk of a court of record or notary public, who shall certify such acknowledgment or proof under the seal of his office, or before any justice of the peace, or police justice, or mayor of any city, town, or village, or clerk of a municipality, or member of the board of supervisors, whether the property conveyed be within his county or not.

SOURCES: Codes, Hutchinson's 1848, ch. 42, arts. 1 (1), 5 (3), 6 (1); 1857, ch. 36, art. 28; 1871, § 2310; 1880, § 1217; 1892, § 2464; 1906, § 2798; Hemingway's

1917, § 2299; 1930, § 2136; 1942, § 857; Laws, 1988, ch. 347, § 2, eff from and after July 1, 1988.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Persons before whom oaths may be taken, see § 11-1-1.

Powers of notaries public and ex officio notaries public to receive proof or acknowledgment of instruments, see §§ 25-33-11, 25-33-17.

Acknowledgment of execution of corporate deed, see § 89-1-21.

Certificate of acknowledgment and proof, see § 89-5-1.

Necessity for acknowledgment or proof for validity of conveyances or mortgages, see § 89-5-3.

Criminal offense of falsely personating another and thereby acknowledging deed, see § 97-19-33.

JUDICIAL DECISIONS

1. In general.

United States commissioner was not "judge of United States court" within statute authorizing judges of United States courts to acknowledge instruments to be recorded, and hence deed acknowledged by such commissioner was not entitled to be admitted to record in clerk's office. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

State, and not federal, statutes determine what officers are competent to take and certify acknowledgments which will entitle instruments to be admitted to record. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

Deed admitted to record without proper acknowledgment did not constitute constructive notice to subsequent purchasers for valuable consideration. Smith v. McIntosh, 176 Miss. 725, 170 So. 303 (1936).

Justice of the peace liable on official bond for false certificate of acknowledgment. Hodges v. Mills, 139 Miss. 347, 104 So. 165 (1925).

An acknowledgment taken to a deed of trust by an officer who is the beneficiary therein is void. Wasson v. Connor, 54 Miss. 351 (1877).

The deputy of a clerk, where the statute authorizes him to perform all the duties enjoined upon his principal, may take an acknowledgment. McRaven v. McGuire, 17 Miss. (9 S. & M.) 34 (1847).

RESEARCH REFERENCES

ALR. Sufficiency of certificate of acknowledgment. 25 A.L.R.2d 1124.

Am Jur. 1 Am. Jur. 2d, Acknowledgments §§ 8 et seq.

1 Am. Jur. Pl & Pr Forms (Rev), Acknowledgments, Forms 1 et seq.

CJS. 1A C.J.S., Acknowledgments §§ 24 et seq.

§ 89-3-5. Acknowledgments before commissioned officers of United States armed forces.

In all cases where a conveyance, contract, agreement or other instrument of writing has heretofore been acknowledged or proved before any commissioned officer in the services of the United States armed forces, such acknowledgment or affidavit is hereby declared to be good, valid and binding to the same extent and with like effect as though such conveyance, contract, agreement, or other instrument of writing had been acknowledged or proved before any officer authorized by law to take acknowledgments in the State of Mississippi.

SOURCES: Codes, 1942, § 857-01; Laws, 1946, ch. 285, § 1.

Cross References — Notarial acts of commissioned officers of the United States armed forces, see § 25-33-23.

§ 89-3-7. Forms of acknowledgment.

The following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate or personal property; and any acknowledgment so taken and certified shall be sufficient to satisfy all requirements of law:

(a) In the case of natural persons acting in their own right:

"STATE OF ________
COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ________ day of ________, 20 ________, within my jurisdiction, the within named ________ , who acknowledged that (he) (she) (they) executed the above and foregoing instrument.

(NOTARY PUBLIC)

My commission expires:

________________ "

(Affix official seal, if applicable)

(b) In the case of corporations:

"STATE OF ________
COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ________ day of ________ , 20 ________, within my jurisdiction, the within named ________, who acknowledged that (he) (she) is ________ of ________, a ________ corporation, and that for and on behalf of the said corporation, and as its act and deed (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.

(NOTARY PUBLIC)

My commission expires:

________________ "

(Affix official seal, if applicable)

(c) In the case of a corporate general partner of a limited partnership:

"STATE OF ________
COUNTY OF________

Personally appeared before me, the undersigned authority in and for the said county and state, on this________ day of________, 20________, within my jurisdiction, the within named________, who acknowledged to me that (he) (she) is________ of________, a ________ corporation and general partner of________, a________ limited partnership, and that for and on behalf of said corporation as general partner of said limited partnership, and as the act and deed of said corporation as general partner of said limited partnership, and as the act and deed of said limited partnership, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited partnership so to do.

(NOTARY PUBLIC)

My commission expires:

________________"

(Affix official seal, if applicable)

(d) In the case of a corporate member of a member-managed limited liability company:

"STATE OF ________
COUNTY OF________

Personally appeared before me, the undersigned authority in and for the said county and state, on this________ day of ________, 20________, within my jurisdiction, the within named ________, who acknowledged to me that (he) (she) is ________ of ________, a ________ corporation and member of ________, a ________ member-managed limited liability company, and that for and on behalf of said corporation as member of said limited liability company, and as the act and deed of said corporation as member of said limited liability company, and as the act and deed of said limited liability company, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited liability company so to do.

(NOTARY PUBLIC)

My commission expires:

________________"

(Affix official seal, if applicable)

(e) In the case of a corporate manager of a manager-managed limited liability company:

"STATE OF ________
COUNTY OF________

Personally appeared before me, the undersigned authority in and for the said county and state, on this________ day of________, 20________, within my jurisdiction, the within named________, who acknowledged to me that (he) (she) is________ of________, a ________ corporation and manager of________, a________ manager-managed limited liability company, and that for and on behalf of said corporation as manager of said limited liability company, and as the act and deed of said corporation as manager of said limited liability company, and as the act and deed of said limited liability company, (he) (she) executed the above and foregoing instrument, after first having been duly authorized by said corporation and said limited liability company so to do.

(NOTARY PUBLIC)

My commission expires:

________________ "

(Affix official seal, if applicable)

(f) In the case of persons acting in representative capacities:

"STATE OF ________
COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ________ day of ________, 20________, within my jurisdiction, the within named ________, who acknowledged that (he) (she) is ________ of ________ and that in said representative capacity (he) (she) executed the above and foregoing instrument, after first having been duly authorized so to do.

(NOTARY PUBLIC)

My commission expires:

________________ "

(Affix official seal, if applicable)

(g) In the case of proof of execution of the instrument made by a subscribing witness:

"STATE OF ________
COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ________ day of ________, 20________, within my jurisdiction, CD, one of the subscribing witnesses to the above and foregoing instrument, who, being first duly sworn, states that (he) (she) saw the within (or above) named AB, whose name is subscribed thereto, sign and deliver the same to EF (or that (he) (she) heard AB acknowledge that (he) (she) signed and delivered the same to EF); and that the affiant subscribed (his) (her) name as witness thereto in the presence of AB.

________________ (CD)
(NOTARY PUBLIC)

My commission expires:

________________ "

(Affix official seal, if applicable)

(h) In the case of any business organization, foreign or domestic:

"STATE OF ________
COUNTY OF ________

Personally appeared before me, the undersigned authority in and for the said county and state, on this ________ day of ________, 20 ________, within my jurisdiction, the within named ________, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed in the above and foregoing instrument and acknowledged that he/she/they executed the same in his/her/their representative capacity(ies), and that by his/her/their signature(s) on the instrument, and as the act and deed of the person(s) or entity(ies) upon behalf of which he/she/they acted, executed the above and foregoing instrument, after first having been duly authorized so to do.

____

(NOTARY PUBLIC)

My commission expires:

________________"

(Affix official seal, if applicable)

SOURCES: Codes, 1892, § 2465; 1906, § 2799; Hemingway's 1917, § 2300; 1930, § 2137; 1942, § 858; Laws, 1988, ch. 475, § 1; Laws, 1992, ch. 354 § 1; Laws, 2000, ch. 446, § 1; Laws, 2011, ch. 538, § 1, eff from and after July 1, 2011.

Editor's Note — Section 2, ch. 475, Laws of 1988, effective from and after July 1, 1988, provides as follows:

"SECTION 2. Acknowledgments in the forms permitted under prior law shall continue to be sufficient to satisfy all requirements of law."

Amendment Notes — The 2011 amendment added (h).

JUDICIAL DECISIONS

1. In general.
2. Conveyance of corporate or partnership property.
3. Impeachment of acknowledgment.
4. Defective acknowledgment.
5. Miscellaneous.

1. In general.

Where a deed was first conveyed to a grandson by the decedent, then conveyed back to the estate, then conveyed to the grandson again by the executrix, but the executrix later sought to set aside the deed when the grandson died, notwithstanding the failure to have strictly followed form, the acknowledgment contained all the necessary information and, therefore, was not fatal to the deed's validity; furthermore, it was clear from the deed that the executrix was acting on behalf of the decedent, the grantor, and, thus, there was no ambiguity Estate of Dykes v. Estate of Williams, 864 So. 2d 926 (Miss. 2003).

There was no ambiguity or disabling defect in an acknowledgment which recited that the grantors "acknowledged that they signed and delivered to the foregoing deed," so as to divest its recordation of its efficacy as constructive notice. Davis v. Gulf Ref. Co., 202 Miss. 808, 32 So. 2d 133 (1947), error overruled, 202 Miss. 817, 34 So. 2d 731 (1948).

Attestation by a single witness is sufficient, and a substantial compliance with the statutory form is all that is required. White v. Union Producing Co., 140 F.2d 176 (5th Cir. 1944).

Where proof of the execution of a colessor's agreement was made in the manner required by law before an officer competent to take the same, and was duly certified to by him, the certificate, showing full compliance with the statute, is conclusive of the facts, except in cases of fraud; and if there was no fraud in procuring the execution of the instrument, there is none in making proof of its execution and having it filed for record. White v. Union Producing Co., 140 F.2d 176 (5th Cir. 1944).

The officer who has properly exercised the judicial function of taking an acknowledgment, may perform the clerical act of making the certificate at any time while he remains in office, if rights of third persons do not intervene. Harmon v. Magee, 57 Miss. 410 (1879).

The certificate of acknowledgment cannot be enlarged by averment. Willis v. Gattman, 53 Miss. 721 (1876).

A certificate showing a full compliance with the statute, except in cases of fraud, is conclusive of the facts. Johnston v. Wallace, 53 Miss. 331, 24 Am. R. 699 (1876).

The term "executed," when used in the acknowledgment of an instrument, imports "signing, sealing, and delivery." Smith v. Williams, 38 Miss. 48 (1859); Perkins, Livingston & Post v. Swank, 43 Miss. 349 (1871).

The description of an officer need not be fully stated-abbreviations may be used; And it seems that evidence aliunde may be heard to show the official character of the officer. Russ v. Wingate, 30 Miss. 440 (1855).

Substantial compliance with the form, even in cases of witnesses, is sufficient. Morse v. Clayton, 21 Miss. (13 S. & M.) 373 (1850).

A deed attested by a single witness is rightfully admitted to record on proof made by him. Wilkins v. Wells, 17 Miss. (9 S. & M.) 325 (1848); Morris v. Rucks, 62 Miss. 76 (1884).

2. Conveyance of corporate or partnership property.

Official acknowledgment for public record of corporate document should in some manner make it clear that it is corporation executing instrument by and through authorized officer, officers, or agent. White v. Delta Found., Inc., 481 So. 2d 329 (Miss. 1985).

The fact that defendant's agent in procuring colessor's agreement was employed at a fixed salary did not disqualify him to act as a nonofficial subscribing witness or to make proof of the execution of such agreement, where he had no pecuniary interest in the matter. White v. Union Producing Co., 140 F.2d 176 (5th Cir. 1944).

Deed signed and acknowledged by corporation's president and attested by secretary under seal held sufficient. Griffis v. Martin Oil Co., 127 Miss. 606, 90 So. 324 (1922).

One partner cannot acknowledge deed to partnership property unless his authority affirmatively appears. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Am. Ann. Cas. 1913A,1081 (1910).

3. Impeachment of acknowledgment.

A certificate of acknowledgment may be shown to be a fraud and a forgery. T.H. & J.M. Allen & Co. v. Lenoir, 53 Miss. 321 (1876).

The officer who makes the certificate is incompetent as a witness to impeach it. Stone v. Montgomery, 35 Miss. 83 (1858).

4. Defective acknowledgment.

Instrument will not necessarily be deemed fatally deficient on basis of omission from acknowledgment where omission can be remedied by reference to body of instrument itself. White v. Delta Found., Inc., 481 So. 2d 329 (Miss. 1985).

A deed which is defectively acknowledged by reason of the fact that word "delivered" was omitted from acknowledgment is good as between the parties. Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948).

Acknowledgment of power of attorney which failed to show acknowledgment of delivery of power, held void. Lucas v. New Hebron Bank, 181 Miss. 762, 180 So. 611 (1938).

Trust created by deed not acknowledged according to law was void; trustees thereunder not entitled to maintain suit to remove cloud on theory that upon failure of trust conveyance to them was absolute. Board of Trustees of M.E. Church S. v. Odom, 100 Miss. 64, 56 So. 314 (1911).

Deed not constructive notice to subsequent purchasers where acknowledgment fatally defective. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Am. Ann. Cas. 1913A,1081 (1910).

Record of deed not notice when acknowledgment omits word "delivered." Ligon v. Barton, 88 Miss. 135, 40 So. 555 (1906).

Acknowledgment which does not state that grantor executed or delivered deed is fatally bad; such deed not entitled to record and not constructive notice. Elmslie v. Thurman, 87 Miss. 537, 40 So. 67 (1906).

Lease not entitled to record because of improper acknowledgment, not ineffective against subsequent grantees with actual notice. Ladnier v. Stewart, 38 So. 748 (Miss. 1905).

The omission of the words "on the day and year therein mentioned," was not, under former statute, a material defect in an acknowledgment. Caruthers v. McLaran, 56 Miss. 371 (1879).

An acknowledgment that one simply "signed" a deed is not sufficient. Robinson v. Noel, 49 Miss. 253 (1873).

5. Miscellaneous.

Intention to deliver deed does not dispense with manual delivery. Lynch v. Lynch, 121 Miss. 752, 83 So. 807 (1920).

Parol evidence admissible to show grantee of land had notice of prior lease. Ladnier v. Stewart, 38 So. 748 (Miss. 1905).

RESEARCH REFERENCES

ALR. Written matter as controlling printed matter in construction of deed. 37 A.L.R.2d 820.

Am Jur. 1A Am. Jur. Legal Forms 2d, Acknowledgments § 7:348 (subscribing witnesses).

7 Am. Jur. Legal Forms 2d, Deeds §§ 87:261 et seq. (formalities of execution).

Law Reviews. Marcase, The absence of a signature requirement in Mississippi notary law: fraud waiting to happen. 13 Miss. C. L. Rev. 371 (Spring, 1993).

§ 89-3-9. Acknowledgment or proof in another state.

If the party who shall execute any conveyance of lands or personal property situated in this state, or if the witnesses thereto reside or be in some other state, territory in the Union, the District of Columbia, or in any possession of the United States, or land over which the United States has sovereign power, then the acknowledgment or proof may be made before and certified by the chief justice of the United States, or an associate justice of the Supreme Court of the United States, or a circuit or district judge of the United States, or any other United States judge, or any judge or justice of the supreme or superior court of any such state, territory, District of Columbia, or possession of the United States, or land over which the United States has sovereign power, or any justice of the peace of such state, territory, District of Columbia, possession, or land over which the United States has sovereign power, whose official character shall be certified under the seal of some court of record in his country, parish or other named official jurisdiction, or before any commissioner residing in such state, territory, District of Columbia, possession, or land over which the United States has sovereign power, who may be appointed by the governor of this state to take acknowledgments and proof of conveyances, or any notary public or a clerk of a court of record having a seal of office in said state, territory, District of Columbia, possession, or land over which the United States has sovereign power, and shall be as good and effectual as if the certificate of acknowledgment or proof had been made by a competent officer in this state.

SOURCES: Codes, Hutchinson's 1848, ch. 42, arts. 1 (13), 6 (1); 1857, ch. 36, art. 29; 1871, § 2312; 1880, § 1219; 1892, § 2466; 1906, § 2800; Hemingway's 1917, § 2301; 1930, § 2138; 1942, § 859; Laws, 1948, ch. 227, § 1.

Cross References — Appointment of commissioners for other states by governor, see § 7-1-17.

Persons before whom oaths may be taken, see § 11-1-1.

Ex officio notaries public, see § 25-33-17.

RESEARCH REFERENCES

ALR. Sufficiency of certificate of acknowledgment. 25 A.L.R.2d 1124.

Am Jur. 1 Am. Jur. 2d, Acknowledgments §§ 40-42.

CJS. 1A C.J.S., Acknowledgments §§ 31, 38.

§ 89-3-11. Acknowledgment or proof in another state; construction and application as to prior acknowledgments.

In the construction of this section and Section 89-3-9, the adoption of such sections shall not be construed as meaning that the word "territory" as used in Section 89-3-9 did not include prior to the adoption of these sections the possessions of the United States, or land over which the United States has sovereign power. And any acknowledgment heretofore taken in any possession of the United States, or any land over which the United States has sovereign power, by any of the officials thereof named above in Section 89-3-9 shall be as good and effectual as if made after the adoption of these sections.

SOURCES: Codes, 1942, § 859.5; Laws, 1948, ch. 227, § 2.

§ 89-3-13. Acknowledgment or proof in foreign country.

If the party who shall execute any conveyance of lands or personal property situated in this state, or if the witnesses thereto, reside or be in a foreign country, the acknowledgment or proof of the execution of such conveyance may be made before any court of record, or the mayor or chief magistrate of any city, borough, or corporation of such foreign country in which the party or witness resides or may be; or before any commissioner residing in such country who may be appointed by the Governor, or before any ambassador, foreign minister, secretary of legation, or consul of the United States to the foreign country in which the party or witness may reside or be; or before any notary public commissioned by the government of the foreign country or any other person authorized by said government to take oaths or acknowledgments; but the certificate shall show that the party, or the party and witness, were identified before the officer, and that the party acknowledged the execution of the instrument, or that the execution was duly proved by the witness, and it shall be as good and effectual as if made and certified by a competent officer of this state.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (14); 1857, ch. 36, art. 30; 1871, § 2313; 1880, § 1220; 1892, § 2467; 1906, § 2801; Hemingway's 1917, § 2302; 1930, § 2139; 1942, § 860; Laws, 1988, ch. 399, eff from and after July 1, 1988.

Cross References — Appointment of commissioners by governor, see § 7-1-17.
Ex officio notaries public, see § 25-33-17.

RESEARCH REFERENCES

ALR. Sufficiency of certificate of acknowledgment. 25 A.L.R.2d 1124.

Am Jur. 1 Am. Jur. 2d, Acknowledgments § 22.

CJS. 1A C.J.S., Acknowledgments §§ 32, 38.

§ 89-3-15. Grantor and witness dead or absent, how proved.

If the grantor and witness or witnesses of any instrument of writing be dead or absent, so that the personal attendance of neither can be had, it may be established by the oath of any person who, on examination before an officer competent to take acknowledgments, can prove the handwriting of the deceased or absent witness or witnesses; or when such proof cannot be had, then the handwriting of the grantor may be proved, and the officer before whom such proof is made shall certify accordingly, and such certificate shall be deemed equivalent to an acknowledgment by the grantor or proof by a subscribing witness, and entitle the instrument to be recorded.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (16); 1857, ch. 36, art. 31; 1871, § 2314; 1880, § 1221; 1892, § 2468; 1906, § 2802; Hemingway's 1917, § 2303; 1930, § 2140; 1942, § 861.

Cross References — When proof of signature is unnecessary, see § 13-1-139.

JUDICIAL DECISIONS

1. In general.

A single witness to a deed is sufficient. Wilkins v. Wells, 17 Miss. (9 S. & M.) 325 (1848); Morris v. Rucks, 62 Miss. 76 (1884).

CHAPTER 5

Recording of Instruments

Article 1. General Provisions 89-5-1
Article 3. Uniform Real Property Electronic Recording Act 89-5-101

ARTICLE 1.

GENERAL PROVISIONS.

SEC.
89-5-1. Recording instruments; conveyances, acknowledgment, priority.
89-5-3. Conveyances, mortgages; void if not lodged for record.
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89-5-29. Mortgages and deeds of trust on land; how recorded.
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89-5-41. Records in counties divided into two districts.
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89-5-45. Substitution of trustee must appear of record; general substitution allowed for certain beneficiaries.
89-5-47 through 89-5-53. Repealed.

§ 89-5-1. Recording instruments; conveyances, acknowledgment, priority.

Except as provided by Sections 89-5-101 through 89-5-113, a conveyance of land shall not be good against a purchaser for a valuable consideration without notice, or any creditor, unless it be lodged with the clerk of the chancery court of the county in which the lands are situated to be recorded; but after filing with the clerk, the priority of time of filing shall determine the priority of all conveyances of the same land as between the several holders of such conveyances.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (1); 1857, ch. 36, art. 19; 1871, § 2304; 1880, § 1209; 1892, § 2454; 1906, § 2784; Hemingway's 1917, § 2288; 1930, § 2146; 1942, § 867; Laws, 1924, ch. 239; Laws, 2011, ch. 364, § 9; Laws, 2011, ch. 538, § 3, eff from and after July 1, 2011.

Joint Legislative Committee Note — Section 9 of ch. 364, Laws of 2011, effective from and after July 1, 2011 (approved March 11, 2011), amended this section. Section 3 of ch. 538, Laws of 2011, effective July 1, 2011 (approved April 26, 2011), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 538, Laws of 2011, which contains language that specifically provides that it supersedes § 89-5-1 as amended by Laws of 2011, ch. 364.

Amendment Notes — The first 2011 amendment (ch. 364) added "Except as provided by Sections 89-5-101 through 89-5-113" at the beginning of the paragraph.

The second 2011 amendment (ch. 538) rewrote the section.

Cross References — Filing and recording of secured transactions under the Uniform Commercial Code, see §§ 75-9-401 et seq.

Payment of insurance to mortgagees in order of priority, see § 83-13-7.

Recording of federal tax liens and other federal lien notices, see § 85-8-1 et seq.

Racketeer Influenced and Corrupt Organization Act, see §§ 97-43-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Applicability to wills.
3. Actual possession as notice.
4. Deeds of trust.
5. Lis pendens.
6. Intervening judgments.
7. Miscellaneous.

1. In general.

Title need not be recorded to bind bona fide purchaser from original owner; purchaser from record owner must ascertain existence of adverse possession hostile thereto. Lowi v. David, 134 Miss. 296, 98 So. 684 (1924).

Deed takes effect as to subsequent purchasers and creditors without notice only from time delivered to be recorded; whether subsequent deed or lien be filed or recorded or not is immaterial. Craig v. Osborn, 134 Miss. 323, 98 So. 598 (1923).

Purchasers for value without notice from grantor's heirs entitled to same protection as if purchasing directly from grantor. Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

Constructive notice begins moment deed is lodged with proper officer for record, and failure of clerk to mark filed when received is immaterial. Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919).

Deed not constructive notice to subsequent purchasers where acknowledgment so defective as not to entitle it to record. Tinnin v. Brown, 98 Miss. 378, 53 So. 780, Am. Ann. Cas. 1913A,1081 (1910).

The mere acknowledgment that a party signed a deed, which was not in fact signed by her, is invalid as a transfer. Jones v. Gurlie, 61 Miss. 423 (1883).

2. Applicability to wills.

Statute making "conveyances" void as to purchasers for value without notice of lands in any county wherein conveyance is not recorded held inapplicable to "wills." Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935), adhered to, 175 Miss. 131, 166 So. 345 (1936).

Probate and record of domestic will in county where testator resided constituted notice throughout state to subsequent mortgagee of land, without necessity of recording will in county where land situated. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935), adhered to, 175 Miss. 131, 166 So. 345 (1936).

3. Actual possession as notice.

An owner in possession by himself or by his tenants is not affected by this statute, his actual possession being all of the notice necessary to any prospective purchaser. Gulf Ref. Co. v. Travis, 201 Miss. 336, 29 So. 2d 100 (1947), error overruled, 201 Miss. 379, 30 So. 2d 398 (1947).

Purchaser charged with notice of rights of tenant in possession. Frye v. Rose, 120 Miss. 778, 83 So. 179 (1919).

4. Deeds of trust.

Defectively acknowledged deed of trust was ineligible for recordation under § 89-5-1, however, fact that it was recorded constituted actual notice to subsequent purchasers of the interest claimed under defective deed of trust such that federal tax lien which attached subsequent to erroneous recordation of defective deed of trust was subordinate thereto. Metropolitan Nat'l Bank v. United States, 716 F. Supp. 946 (S.D. Miss. 1989), rev'd on other grounds, 901 F.2d 1297 (5th Cir. 1990).

A recorded deed of trust, containing an erroneous description of the land conveyed by the grantor, which recited that the land in question contained 60 acres more or less, whereas the grantor only owned 40 acres, was not sufficient to put the grantor's judgment creditors on notice that an entirely different tract of land was intended to be included, and did not give notice of a description which a diligent search of the records might have disclosed as to other lands belonging to the grantor, so that while the grantee was entitled to a reformation of a trust deed as against the grantor, he was not so entitled as against the judgment creditors, who had executed on the land actually owned by the grantor. Mississippi Indus. for Blind v. Jackson, 231 Miss. 135, 95 So. 2d 109 (1957).

5. Lis pendens.

The filing of a notice of lis pendens in an action before the recordation of a prior deed is effective to make a judgment recovered against the grantor after such recordation a lien on the property conveyed. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640 (1964).

6. Intervening judgments.

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962).

In view of the provisions of the statute (Howard & H. Stat. 1840, ch. 34, p. 344, § 5) requiring the recording of an instrument to make it effective as against third persons, a judgment rendered in the interval between the execution and the recording of a deed is a lien upon the land of the debtor. Taylor v. Doe ex dem. Miller, 54 U.S. 287, 14 L. Ed. 149 (1851).

7. Miscellaneous.

The recording of an instrument does not put any subsequent purchaser on inquiry notice. C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526 (Miss. 1988).

Certificate of acknowledgment of a deed is presumed to state the truth. Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969).

Mortgagee loaning money for the purchase of lots and construction of houses thereon should advance proceeds with reasonable diligence in order that holders of statutory liens may not be unjustly defeated in their claims. First Nat'l Bank v. Virden, 208 Miss. 679, 45 So. 2d 268 (1950).

Mortgagee who makes loan to mortgagor to enable him to purchase land and materials and lumber for the construction of houses thereon and turns money over to mortgagor as he asks for it, knowing that houses are being constructed, but doing nothing to see that such construction is being paid for, has preference over materialmen only to extent that its funds actually go into the construction, when mortgagor fails to use all money advanced by mortgagee for payment of those furnishing materials. First Nat'l Bank v. Virden, 208 Miss. 679, 45 So. 2d 268 (1950).

This section [Code 1942, § 867] and Code 1942, §§ 868 and 869 are inapplicable where a grantee accepts a conveyance of certain mineral interests, which conveyance is expressly made subject to any valid and subsisting leases and further obligates the grantor to permit the grantee to receive half of the benefits accruing or to accrue under such leases. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Purchaser held entitled under statute to value of house built during his possession of land in good faith belief that he had full title, as against heirs of wife of his remote grantor who owned a half interest, irrespective of his constructive notice of their rights by recorded deed in the chain of title. Brunt v. McLaurin, 178 Miss. 86, 172 So. 309 (1937).

Deed of trust covering land and ginning machinery and "equipment" did not include seed house constructed on leased railroad right of way. Y.D. Lumber Co. v. Refuge Cotton Oil Co., 153 Miss. 302, 120 So. 447 (1929).

Conveyance is not good against purchaser for value without notice, unless acknowledged or proven and lodged with clerk to be recorded; deed not lodged with clerk to be recorded is void as to subsequent purchaser without notice, even though holder has it filed after subsequent conveyance is executed. Owen v. Potts, 149 Miss. 205, 115 So. 336 (1928).

U.S. revenue laws making invalid unstamped written instruments do not make such instruments unrecordable. Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919).

Notice not given where particular trust deed under which sale is made is referred to, which as recorded has on its face no pertinency to the actual sale, even if referred to by proper deed book and page. Provine v. Thornton, 92 Miss. 395, 46 So. 950 (1908).

RESEARCH REFERENCES

ALR. Title by adverse possession as affected by recording statutes. 9 A.L.R.2d 850.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages. 43 A.L.R.5th 519.

Am Jur. 21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Forms 1 et seq.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-5-3. Conveyances, mortgages; void if not lodged for record.

Except as provided by Sections 89-5-101 through 89-5-113, all bargains and sales, and all other conveyances whatsoever of lands, whether made for passing an estate of freehold or inheritance, or for a term of years; and all instruments of settlement upon marriage wherein land, money, or other personality should be settled or covenanted to be left or paid at the death of the party, or otherwise; and all deeds of trust and mortgages whatsoever, shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they be acknowledged or proved and lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded. Failure to file such instrument with the clerk for record shall prevent any claim of priority by the holder of such instrument over any similar recorded instrument affecting the same property, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice. But as between the parties and their heirs, and as to all subsequent purchasers with notice or without valuable consideration, said instruments shall nevertheless be valid and binding.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (2), (3); 1857, ch. 36, arts. 20, 21; 1871, §§ 2303, 2306; 1880, §§ 1211, 1212; 1892, §§ 2456, 2457; 1906, §§ 2786, 2787; Hemingway's 1917, §§ 2290, 2291; 1930, §§ 2143, 2147; 1942, §§ 864, 868; Laws, 1924, ch. 239; Laws, 2011, ch. 364, § 10, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment added "Except as provided by Sections 89-5-101 through 89-5-113" at the beginning of the paragraph.

Cross References — Recording of partition decrees, see § 11-21-37.
Effect of failure to enter notice of lis pendens, see § 11-47-9.
Constructive notice provided by lost or destroyed records, see § 25-55-31.
Recording of satisfaction by surety of judgment, see § 87-5-11.
Acknowledgment and proof generally, see §§ 89-3-3 et seq.
Recording of decree establishing title to property by descent, see § 91-1-31.
Recording notice of power of appointment, see § 91-15-15.

JUDICIAL DECISIONS

1. In general.
2. Who may claim benefit of provision.
3. Record of void instrument.
4. Effect of failure to record or delay in recording.
5. Miscellaneous.

1. In general.

The purpose of the registry statute is that the record shall contain complete information about titles to land located in the county, and to effectuate this purpose, the courts should require and authorize the recording of equitable as well as legal interests. Burkett v. Peoples Bank, 225 Miss. 291, 83 So. 2d 185 (1955), suggestion of error overruled, opinion modified, 225 Miss. 302, 83 So. 2d 763 (1955).

This section [Code 1942, § 868] and Code 1942, §§ 867 and 869, are inapplicable where a grantee accepts a conveyance of certain mineral interests, which conveyance is expressly made subject to any valid and subsisting leases and further obligates the grantor to permit the grantee to receive half of the benefits accruing or to accrue under such leases. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Statute making conveyances void if not recorded is inapplicable to wills. Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935), adhered to, 175 Miss. 131, 166 So. 345 (1936).

This section [Code 1942, § 868] held not superseded by Uniform Warehouse Receipts Law. Marine Bank & Trust Co. v. Greenville Sav. Bank & Trust Co., 133 Miss. 91, 97 So. 526 (1923).

This statute applies with as much force with proper officer for record, and failure of clerk to mark filed is immaterial. Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919).

This section [Code 1942, § 868] applied in bankruptcy. Laurel Oil & Fertilizer Co. v. Horne, 101 Miss. 629, 57 So. 624 (1912), on suggestion of error, 101 Miss. 634, 58 So. 652 (1912).

2. Who may claim benefit of provision.

This statute applies with as much force to a creditor obtaining a lien by judgment as it does to a subsequent purchaser or encumbrancer, and creditors without notice and subsequent purchasers for value without notice are in the same footing and are protected to the same extent. Burkett v. Peoples Bank, 225 Miss. 291, 83 So. 2d 185 (1955), suggestion of error overruled, opinion modified, 225 Miss. 302, 83 So. 2d 763 (1955).

"Creditor" or "subsequent purchaser" within statute providing that recorded lien should have no effect as to "creditors" and "subsequent purchasers" where remedy thereon was barred by limitations unless renewal or extension is entered on record is person who has parted with something of value on appearance of record, so that apparent bar cannot be availed of by one who became junior lienor before bar attached, and while notice imparted by recorded instrument was in full force. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

Person who became judgment creditor of mortgagor, before bar of limitations against enforcement of lien by mortgagee appeared of record, held not "creditor" or "subsequent purchaser" within statute. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

Purchasers for value without notice from grantor's heirs are entitled to same protection as if purchasing directly from grantor. Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922).

A purchaser from a vendee of lands may rely on the recitals in the deeds as to payments. Hiller v. Jones, 66 Miss. 636, 6 So. 465 (1889).

The creditors embraced are those who have obtained a lien. Loughridge & Bogan v. Bowland, 52 Miss. 546 (1876).

A purchaser at execution sale is not affected by notice of an unrecorded deed if the judgment-creditor had no notice thereof when his lien attached. Harper v. Tapley, 35 Miss. 506 (1858); Taylor v. Lowenstein, 50 Miss. 278 (1874); Humphreys v. Merrill, 52 Miss. 92 (1876); Perry Nugent & Co. v. Priebatsch, 61 Miss. 402 (1883).

"Purchasers for a valuable consideration" designate that class of persons who have been declared to be such by the courts. Wailes v. Cooper, 24 Miss. 208 (1852); Claiborne v. Holmes, 51 Miss. 146 (1875).

Subsequent purchasers mean purchasers from the grantors directly. Sessions v. Doe, 15 Miss. (7 S. & M.) 130 (1846); Henderson v. Downing, 24 Miss. 106 (1852); Mississippi Valley Co. v. Chicago, S.L. & N.O.R. Co., 58 Miss. 846 (1881); Chaffe v. Halpin & Bonham, 62 Miss. 1 (1884).

Under this statute creditors, as well as subsequent purchasers, are affected by notice of a prior, unrecorded deed. Dixon v. Lacoste, 9 Miss. (1 S. & M.) 70 (1843).

3. Record of void instrument.

Recordation of a deed or mortgage containing a void description does not meet the requirements of the statute. In re Tucker, 1 F. Supp. 18 (S.D. Miss. 1932); Sack v. Gilmer Dry Goods Co., 149 Miss. 296, 115 So. 339 (1928).

Unsigned recorded deed not notice. Rainey v. Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367 (1908).

Where a mortgage is void on its face the beneficiaries thereof cannot occupy the relation of bona fide purchasers. Acme Lumber Co. v. Hoyt & Bros. Co., 71 Miss. 106, 14 So. 464 (1893).

4. Effect of failure to record or delay in recording.

Unrecorded deed to shopping center voids title of bankruptcy debtor who is to take under deed and shopping center property is therefore not subject to automatic stay in bankruptcy proceeding. Mutual Benefit Life Ins. Co. v. Pinetree, Ltd., 876 F.2d 34 (5th Cir. 1989).

Failure to record an instrument does not affect its efficacy as between the parties thereto, nor does it prevent such an instrument from binding all subsequent purchasers who take either with notice of the instrument or who have not paid valuable consideration. Chevron Oil Co. v. Clark, 291 F. Supp. 552 (S.D. Miss. 1968), aff'd in part, rev'd on other grounds, 432 F.2d 280 (5th Cir. 1970).

New promise to avoid bar of statute of limitations is not required to be recorded except as to creditors and subsequent purchasers for value without notice. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

Deed or mortgage, unless recorded, is void as to creditor obtaining lien by judgment. Sack v. Gilmer Dry Goods Co., 149 Miss. 296, 115 So. 339 (1928).

Mortgagee for value without notice, not chargeable with unrecorded assignment of lease. Corinth Bank & Trust Co. v. Wallace, 111 Miss. 62, 71 So. 266 (1916).

Enrolled judgment good against subsequently recorded deed from husband to wife. Austin Clothing Co. v. Posey, 105 Miss. 720, 63 So. 224, 1 A.L.R. 13 (1914).

Execution sale of land good against prior unrecorded deed. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

Under this section [Code 1942, § 868], taken in connection with Code 1942, § 869, where a trust deed is made to one who fails to record it until after another has received and recorded a trust deed on the same land, the latter having knowledge of the first deed, the purchaser under the last, though having no actual knowledge of the facts, is not protected as against the prior deed, if at the time of his purchase it had been recorded. Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

5. Miscellaneous.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, because the judgment creditors' liens were filed before the refinancing mortgage was filed, and they attached upon the property being reconveyed from the minor back to the debtor, under Miss. Code Ann. §§ 89-5-3, 89-5-25, the bank was last in priority. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

Defectively acknowledged deed of trust was ineligible for recordation under § 89-5-1, however, fact that it was recorded constituted actual notice to subsequent purchasers of the interest claimed under defective deed of trust such that federal tax lien which attached subsequent to erroneous recordation of defective deed of trust was subordinate thereto. Metropolitan Nat'l Bank v. United States, 716 F. Supp. 946 (S.D. Miss. 1989), rev'd on other grounds, 901 F.2d 1297 (5th Cir. 1990).

Certificate of acknowledgment of a deed is presumed to state the truth. Arnold v. Byrd, 222 So. 2d 410 (Miss. 1969).

In a suit against a notary and his surety for affixing a false notarial certificate of acknowledgment to a deed of trust, proof of the value of the land described in the deed, the amount of prior liens, the fact that security was ample to enable the plaintiff to collect the balance on the note if the deed had been a valid instrument, and that he was otherwise unable to collect, supported a finding that the false notarial certificate was the proximate cause of the plaintiff's damages when default occurred on the note. King v. State, 222 So. 2d 393 (Miss. 1969).

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. Herrington v. Heidelberg, 244 Miss. 364, 141 So. 2d 717 (1962).

A recorded deed of trust, containing an erroneous description of the land conveyed by the grantor, which recited that the land in question contained 60 acres more or less, whereas the grantor only owned 40 acres, was not sufficient to put the grantor's judgment creditors on notice that an entirely different tract of land was intended to be included, and did not give notice of a description which a diligent search of the records might have disclosed as to other lands belonging to the grantor, so that while the grantee was entitled to a reformation of a trust deed as against the grantor, he was not so entitled as against the judgment creditors, who had executed on the lands actually owned by the grantor. Mississippi Indus. for Blind v. Jackson, 231 Miss. 135, 95 So. 2d 109 (1957).

The record of a deed of trust is sufficient to charge creditors and subsequent purchasers with constructive notice of its existence, notwithstanding an error in the description, whenever it is apparent what the error is and the description is such as reasonably to enable creditors and subsequent purchasers to find the land. Burkett v. Peoples Bank, 225 Miss. 291, 83 So. 2d 185 (1955), suggestion of error overruled, opinion modified, 225 Miss. 302, 83 So. 2d 763 (1955).

Purchaser of land for value from owner of record, who goes into possession of land without actual notice of any claims against land, does not have constructive notice of existing recorded trust deed upon land executed by grantee in unrecorded deed from purchaser's grantor, and purchaser is entitled to have trust deed cancelled as cloud on his title. Morgan v. Mars, 207 Miss. 848, 43 So. 2d 563 (1949).

Abstractor is not required to search all of records in order to see whether or not some outsider, unknown to records, has conveyed property to some other person; he may safely assume title to be in party shown by records to have title. Morgan v. Mars, 207 Miss. 848, 43 So. 2d 563 (1949).

Actual possession by the owner of land or his tenants, not actual knowledge of such possession, is all of the notice necessary to overcome priority of filing for record. Gulf Ref. Co. v. Travis, 201 Miss. 336, 29 So. 2d 100 (1947), error overruled, 201 Miss. 379, 30 So. 2d 398 (1947).

Deed of trust on personal property immediately taken to county of buyer's residence not constructive notice to subsequent purchaser for value unless recorded in such county. McLarty v. Ashmore, 128 Miss. 735, 91 So. 421 (1922).

Purchase of property in the name of one person while another pays purchase price results in trust in favor of party paying, and such property cannot be sold under execution. Cannon v. Holburg Mercantile Co., 108 Miss. 102, 66 So. 400 (1914).

Purchaser of property covered by deed of trust which refers to notes secured thereby, chargeable with notice that notes provided for attorney's fee. Turberville v. Simpson, 94 Miss. 154, 47 So. 784 (1908).

The purchaser of land where the record shows a good title is not bound to look beyond the record to a former occupancy. Hiller v. Jones, 66 Miss. 636, 6 So. 465 (1889).

ATTORNEY GENERAL OPINIONS

The filing of a deed in the wrong judicial district within a county that has two judicial districts is void as to all creditors and subsequent purchasers for valuable consideration without notice, but valid between the parties and their heirs. Garner, Oct. 5, 2001, A.G. Op. #01-0628.

RESEARCH REFERENCES

ALR. Record of instrument which comprises or includes an interest or right that is not a proper subject of record. 3 A.L.R.2d 577.

Agreement between real-estate owners restricting use of property as within contemplation of recording laws. 4 A.L.R.2d 1419.

Coverage of "nonrecording" or "nonfiling" insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument. 51 A.L.R.2d 325.

Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer. 53 A.L.R.2d 936.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages. 43 A.L.R.5th 519.

Priority between mechanics' liens and advances made under previous executed mortgage. 80 A.L.R.2d 179.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 138-141.

21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Forms 1 et seq.

CJS. 59 C.J.S., Mortgages §§ 257 et seq.

76 C.J.S., Records, §§ 37-40.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-5-5. Priority of all instruments, and notice thereof controlled by date of filing for record; take effect, when.

Every conveyance, covenant, agreement, bond, mortgage, and deed of trust shall take effect, as to all creditors and subsequent purchasers for a valuable consideration without notice, only from the time when delivered to the clerk to be recorded; and no conveyance, covenant, agreement, bond, mortgage, or deed of trust which is unrecorded or has not been filed for record, shall take precedence over any similar instrument affecting the same property which may be of record, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (5); 1857, ch. 36, art. 23; 1880, § 1213; 1892, § 2458; 1906, § 2788; Hemingway's 1917, § 2292; 1930, § 2148; 1942, § 869; Laws, 1924, ch. 239.

Cross References — Protection of paramount rights in partition proceedings, see § 11-21-41.

Protection of mortgagees by fire insurance policy in order of priority, see § 83-13-7.

Recording of powers of appointment, see § 91-15-15.

Crime of selling encumbered property without notice of encumbrance to vendee, see § 97-19-51.

JUDICIAL DECISIONS

1. In general.
2. Clerical errors; incomplete or incorrect instruments.
3. Priority of recording.
4. Vesting of title.
5. What constitutes actual knowledge.
6. Mechanic's and materialman's liens.
7. Miscellaneous.

1. In general.

Recordation under this statute gives constructive notice binding upon those subsequently dealing with the land. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So. 2d 629 (1948).

A nominal consideration, although a good consideration, is not a valuable consideration within the meaning of this statute so as to give a recorded deed for a nominal consideration precedent over an unrecorded prior deed for a valuable consideration. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So. 2d 629 (1948).

This statute is not displaced by the law of merger. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So. 2d 629 (1948).

Notice begins moment deed is lodged with proper officer for record, and failure of clerk to mark filed is immaterial. Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919).

This section [Code 1942, § 869] applies only to legal and not equitable title. Dedeaux v. Cuevas, 107 Miss. 7, 64 So. 844 (1914).

2. Clerical errors; incomplete or incorrect instruments.

Unsigned recorded deed not notice. Rainey v. Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367 (1908).

Record of deed not notice where acknowledgement omitted word "delivered." Ligon v. Barton, 88 Miss. 135, 40 So. 555 (1906).

The grantee has done all the law requires of him when he has filed his deed for record, and it will prevail, although the clerk make a mistake in recording it. Mangold v. Barlow, 61 Miss. 593 (1883); Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

3. Priority of recording.

The fact that the first party waited until well after the second party recorded his deed to the property in question to place on record his own claim barred him, under § 89-5-5, from claiming priority of title over property deed. Kelly v. Shoemake, 460 So. 2d 811 (Miss. 1984).

The filing of a notice of lis pendens in an action before the recordation of a prior deed is effective to make a judgment recovered against the grantor after such recordation a lien on the property conveyed. Jones v. Jones, 249 Miss. 322, 161 So. 2d 640 (1964).

The deed first filed is presumed, in absence of contrary evidence, to be that first executed. Biglane v. Rawls, 247 Miss. 226, 153 So. 2d 665 (1963).

Execution sale good against prior unrecorded deed. Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908), on suggestion of error, 47 So. 666 (Miss. 1908).

Purchasers of land without notice of unrecorded bond for title to way over the land, whose deed is first recorded, acquire an absolute unencumbered title. Wills v. Reid, 86 Miss. 446, 38 So. 793 (1905).

4. Vesting of title.

Title to property vests upon delivery of deed and not when signed and acknowledged. Cannon v. Holburg Mercantile Co., 108 Miss. 102, 66 So. 400 (1914).

5. What constitutes actual knowledge.

Defectively acknowledged deed of trust was ineligible for recordation under § 89-5-1, however, fact that it was recorded constituted actual notice to subsequent purchasers of the interest claimed under defective deed of trust such that federal tax lien which attached subsequent to erroneous recordation of defective deed of trust was subordinate thereto. Metropolitan Nat'l Bank v. United States, 716 F. Supp. 946 (S.D. Miss. 1989), rev'd on other grounds, 901 F.2d 1297 (5th Cir. 1990).

Actual possession by the owner of land or his tenants, not actual knowledge of such possession, constitutes actual notice under the registration statutes. Gulf Ref. Co. v. Travis, 201 Miss. 336, 29 So. 2d 100 (1947), error overruled, 201 Miss. 379, 30 So. 2d 398 (1947).

Under Code 1942, § 868, taken in connection with this section [Code 1942, § 869], where a trust deed is made to one who fails to record it until after another has received and recorded a trust deed on the same land, the latter having knowledge of the first deed, the purchaser under the last, though having no actual knowledge of the facts, is not protected as against the prior deed, if at the time of his purchase it had been recorded. Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

6. Mechanic's and materialman's liens.

When it is shown that the petitioner has a laborer's lien or materialman's lien upon property constructed or repaired, those who claim to have superior liens as purchasers or encumbrances for a valuable consideration without notice must specifically and affirmatively plead their lien; for the burden of proof is upon one who claims to be an encumbrancer for value without notice, and he must show facts which will bring such claim within the exceptions set out in Code 1942, § 356. Enterprise Plumbing Co. v. Bailey Mtg. Co., 209 So. 2d 825 (Miss. 1968).

Mechanic's and materialman's liens for labor performed and materials furnished in connection with installation of fixed machinery and equipment to prepare manufacturing plant for operation has priority over lien of deed of trust executed after mechanic acquired his lien in compliance with prior agreement to secure note by deed of trust on after acquired property in nature of machinery and equipment to be acquired and used in manufacturing business. Buckwalter v. McElroy, 205 Miss. 54, 38 So. 2d 317 (1949).

7. Miscellaneous.

Where the trustee in bankruptcy abandoned property owned by the debtor which had brought less than the amount of either of the liens of a chattel mortgagee or judgment creditor when sold, the proceedings in bankruptcy did not affect the rights of the lienholders, and the holder of the judgment lien retained priority to the funds. Brookhaven Bank & Trust Co. v. Gwin, 253 F.2d 17 (5th Cir. 1958).

A recorded deed of trust, containing an erroneous description of the land conveyed by the grantor, which recited that the land in question contained 60 acres more or less, whereas the grantor only owned 40 acres, was not sufficient to put the grantor's judgment creditors on notice that an entirely different tract of land was intended to be included, and did not give notice of a description which a diligent search of the records might have disclosed as to other lands belonging to the grantor, so that while the grantee was entitled to a reformation of a trust deed as against the grantor, he was not so entitled as against the judgment creditors, who had executed on the land actually owned by the grantor. Mississippi Indus. for Blind v. Jackson, 231 Miss. 135, 95 So. 2d 109 (1957).

Mortgagee was entitled to priority against a second mortgagee for advancements subsequent to second mortgagee for advancements subsequent to second mortgage only if he did not have actual notice of second mortgage where trust deed provided that all further advances to mortgagee were to be secured as principal of obligation. North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950).

After notice of attaching a junior lien, the senior mortgagee ordinarily will not be protected in making further advances under his mortgage given to secure such advances, where he was under no binding engagement to make such advances. North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412 (1950).

Where at the time subsequent purchaser acquired title to land he had actual as well as constructive knowledge that the minerals had been reserved in the deed by the original grantor to his vendor, he could not invoke the aid of this section [Code 1942, § 869] on the theory of after acquired title by reason of a quitclaim deed to his vendor from the original grantor for a nominal consideration as against a prior unrecorded conveyance of minerals by the original grantor to a third person for valuable consideration. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So. 2d 629 (1948).

A subsequent purchaser for valuable consideration after quitclaim deed to his vendor as to whom the original grantor had reserved the mineral rights, without notice of a prior unrecorded conveyance of the minerals from the original grantor to a third person for valuable consideration, acquired fees simple title to the property, notwithstanding that his vendor, having paid only a nominal consideration for the quitclaim deed, could not have invoked the benefits of this statute. Smith County Oil Co. v. Jefcoat, 203 Miss. 404, 33 So. 2d 629 (1948).

This section [Code 1942, § 869] and Code 1942, §§ 867 and 868 are inapplicable where a grantee accepts a conveyance of certain mineral interests, which conveyance is expressly made subject to any valid and subsisting leases and further obligates the grantor to permit the grantee to receive half of the benefits accruing or to accrue under such leases. Gulf Ref. Co. v. Harrison, 201 Miss. 323, 30 So. 2d 44 (1947), suggestion of error overruled, 201 Miss. 335, 30 So. 2d 807 (1947).

Failure to record security for debt because of inattention or agreement without purpose to give grantor fictitious credit, is not fraudulent as to grantor's creditors. Robertson & Co. v. Columbus Ins. & Banking Co., 85 Miss. 234, 38 So. 100 (1905).

A municipal tax deed, not filed as per §§ 3028 and 3823 of the Code of 1982 (§§ 3433 and 4338 Code 1906), must be excluded under this section [Code 1942, § 869]. Sintes v. Barber, 78 Miss. 585, 29 So. 403 (1901).

Section 89-5-19, which reverses the usual "race/notice" priority rule set out in § 89-5-5 in the situation when a creditor takes a position secured by a lien on real property at a time when an earlier creditor's lien on the same property appears on the face of the public record to be time-barred, establishes an exception to the "race/notice" scheme, not a statute of limitations. Barhorst v. Armstrong, 42 F. 2 (C.C.D. Ohio 1890).

RESEARCH REFERENCES

ALR. Attachment, garnishment, execution, or similar process in action on note or bond, not resulting in sale of mortgaged property, as precluding foreclosure of real-estate mortgage. 37 A.L.R.2d 959.

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws §§ 133 et seq.

13 Am. Jur. Proof of Facts, Delivery of Deeds, § 21 (recordation of deed as evidence of delivery).

CJS. 76 C.J.S., Records § 20.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-5-7. Written contracts in relation to land recordable.

Every title-bond or other written contract in relation to land may be acknowledged or proved, and certified and recorded, in the same manner as conveyances of land; and such acknowledgment or proof, and the proper certificate thereof and delivery to the clerk of the chancery court of the proper county to be recorded, shall be notice to all subsequent purchasers of the existence of such bond or contract.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (6); 1857, ch. 36, art. 24; 1871, § 2307; 1880, § 1214; 1892, § 2459; 1906, § 2789; Hemingway's 1917, § 2293; 1930, § 2141; 1942, § 862.

Cross References — When a lost record shall cease to provide constructive notice, see § 25-55-31.

Recording of contracts for erection, construction or repair of buildings, see § 85-7-139.

Necessity of acknowledgment or proof for recording of instrument, see § 89-3-1.

JUDICIAL DECISIONS

1. In general.

Court construed Miss. Code § 89-5-7 to mean that contract relating to land is not automatically binding on subsequent purchasers, but one can bind subsequent purchasers by recording contract, without which, contract will not be binding. Buras v. Shell Oil Co., 666 F. Supp. 919 (S.D. Miss. 1987).

U.S. revenue laws making invalid unstamped written instrument do not render unstamped deed unrecordable. Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919).

A recital in a deed of trust to secure a part of the purchase money of land that the vendor's lien for the remaining portion of the purchase money is to remain unimpaired, is not a contract within the meaning of the section [Code 1942, § 862]. Mairs v. Bank of Oxford, 58 Miss. 919 (1877).

A power of attorney to sell and convey land is a contract within this section [Code 1942, § 862]. Hughes v. Wilkinson's Lessee, 37 Miss. 482 (1859).

RESEARCH REFERENCES

ALR. Agreement between real-estate owners restricting use of property as within contemplation of recording laws. 4 A.L.R.2d 1419.

Am Jur. 66 Am. Jur. 2d, Records and Recording Laws § 47.

§ 89-5-8. Affidavits relating to identification, marital status, heirship, etc. of party to instrument affecting real estate titles recordable; admissibility.

(1) Any affidavit relating to the identification, the marital status, the heirship, the relation, the death, or the time of death, of any person who is a party to any instrument affecting the title to real estate, or any affidavit relating to the identification of any corporation or other legal entity which is a party to any instrument affecting the title to real estate, duly sworn to and acknowledged before any officer or person authorized to administer an oath under the laws of this state, shall be recordable in the land records in the office of the chancery clerk in the county where the real estate is situated.

(2) Any affidavit so recorded, or a certified copy thereof, shall be admissible as evidence in any action involving the instrument to which it relates or the title to the real estate affected by the instrument and shall be prima facie evidence of the facts stated therein and the marketability of the title to real estate.

SOURCES: Laws, 2007, ch. 444, § 1, eff from and after passage (approved Mar. 26, 2007.)

§ 89-5-9. Copies of certain records may be recorded.

A copy of the record of any instrument of writing affecting property in this state, and which has been legally recorded in any other state of the United States, or in a foreign country, when certified by the clerk or other officer in whose custody the record is, under his seal of office, if he have one, may be recorded in this state in the same way and with like effect as if it had been executed and acknowledged in this state.

SOURCES: Codes, 1880, § 1222; 1892, § 2469; 1906, § 2803; Hemingway's 1917, § 2304; 1930, § 2144; 1942, § 865.

Cross References — Forgery of records, see § 97-21-45.

§ 89-5-11. Patents issued by United States or this state recordable.

All patents issued in the name of the United States or of this state for lands, may, whether acknowledged or not, be recorded in the office of the clerk of the chancery court of the county in which the land embraced in the patent may lie.

SOURCES: Codes, 1857, ch. 61, art. 231; 1880, § 1625; 1892, § 2470; 1906, § 2804; Hemingway's 1917, § 2305; 1930, § 2145; 1942, § 866.

Cross References — Records of land office, see §§ 7-11-13 et seq.
Land office certificates as evidence, see § 13-1-131.
Conveyances of land by state by means of patents, see § 29-1-81.

§ 89-5-13. Instruments of conveyance recorded for seven and ten years; acknowledgment valid.

(1) Concerning an interest in land, whenever an instrument of conveyance (including but not limited to a deed of trust or assignment), release, termination or cancellation which contains a defective acknowledgement has been of record seven (7) years or more in the land records of the county in which the said land is located, the acknowledgment shall be good without regard to the form of the certificate of acknowledgment.

(2) Any such instrument which has been of record for ten (10) years and which bears no acknowledgement shall likewise be treated as if properly acknowledged.

SOURCES: Codes, 1942, § 867.5; Laws, 1954, ch. 224, §§ 1, 2; Laws, 1999, ch. 412, § 1, eff from and after July 1, 1999.

JUDICIAL DECISIONS

1. In general.
2. Fraud.

1. In general.

Section 89-5-13 is a curative statute for deeds with defective acknowledgements, and therefore did not cure a deed's total lack of acknowledgement. Greenlee v. Mitchell, 607 So. 2d 97 (Miss. 1992).

Section 89-5-13, a purely curative statute for a deed which has been of record for 20 years with a defect in the acknowledgment, had no bearing or relevance to the issue of whether the signature on a deed was authorized, and did not create a presumption that it was. Goodwin v. McMurphy, 435 So. 2d 639 (Miss. 1983).

2. Fraud.

The statute does not operate to sanction fraud, but rather is a curative statute for deeds with defective acknowledgments, and, therefore, does not apply to a forged deed. King v. King, 760 So. 2d 830 (Miss. Ct. App. 2000).

§ 89-5-15. Transfer of record; debt to be noted on record.

Except as provided in Section 89-5-37, Mississippi Code of 1972, when the indebtedness, or any part thereof, secured by a mortgage, deed of trust, or other lien of record shall be assigned by the person appearing by the record to be the creditor, he shall be required by the assignee to enter the fact of the assignment on the margin of the record of the lien; and in default of making such entry, any satisfaction or cancellation of the lien or instrument evidencing it entered by the original creditor shall release the same as to subsequent creditors and purchasers for value without notice, unless the assignment be by writing duly acknowledged and filed for record; and every assignment by an assignee of any such lien shall be entered in like manner and with like effect in case of failure.

SOURCES: Codes, 1892, § 2461; 1906, § 2794; Hemingway's 1917, § 2295; 1930, § 2150; 1942, § 871; Laws, 1988, ch. 428, § 3, eff from and after passage (approved April 23, 1988).

Cross References — Recording assignment of secured transaction under Uniform Commercial Code, see § 75-9-405.

Assignment of notes or other writings, see § 75-13-1.

JUDICIAL DECISIONS

1. In general.

The fact of the assignment is all that is required under this section [Code 1942, § 871] to be entered on the margin of the record of the lien, and it is not required that in case of a partnership a name or the names of the partners shall be stated. Frierson Bldg. Supply Co. v. Pritchard, 253 Miss. 541, 176 So. 2d 301 (1965).

Assignment by Federal Farm Mortgage Corporation of note and deed of trust in favor of land bank commissioner is effective transfer, as note and deed of trust became property of Federal Farm Mortgage Corporation under Federal Farm Mortgage Corporation Act, 12 USCS § 1020b. Triplett v. Bridgforth, 205 Miss. 328, 38 So. 2d 756 (1949).

Tax sale of land which was void as to city, holding a lien on the land by virtue of having made a loan and having accepted assignment of a deed of trust to the land as security therefor, as authorized by law, for the reason that the chancery clerk's notation on record did not show that notice of the tax sale was sent by registered mail to the city as required by statute, did not impair or destroy the city's right subsequently to convey the land, or affect the rights of its grantees. Pace v. Wedgeworth, 198 Miss. 1, 20 So. 2d 842 (1945).

Assignment of note and trust deed, entered on the bottom of the trust deed on the record together with a certificate or attestation signed by the clerk stating that the assignment had been filed and recorded was valid under this section [Code 1942, § 871]. Pace v. Wedgeworth, 198 Miss. 1, 20 So. 2d 842 (1945).

Appointment of substitute trustee by assignee of debt valid, though assignment not noted on record. Scruggs v. Northern, 123 Miss. 169, 85 So. 89 (1920).

Assignment of debt, though in form of deed of trust, may be noted on deed of trust record. West v. Union Naval Stores Co., 116 Miss. 743, 77 So. 609 (1918), error overruled 117 Miss. 153, 77 So. 961 (1918).

RESEARCH REFERENCES

ALR. Conflict of laws as to application of statute proscribing or limiting availability of action for deficiency after sale of collateral real estate. 44 A.L.R.3d 922.

§ 89-5-17. Assignments of indebtedness to be marked on record.

Except as provided in Section 89-5-37, all assignments in whole or in part of any indebtedness secured by mortgage, deed of trust, or other lien of record, shall be entered on the margin of the record of the lien or said assignment shall be acknowledged and filed for record, and if the assignor or assignee of said indebtedness fail to comply with the provisions of this section the debtor shall be fully protected in transactions with the holder of record in the absence of actual notice of the assignment.

SOURCES: Codes, 1906, § 2795; Hemingway's 1917, § 2296; 1930, § 2151; 1942, § 872; Laws, 1988, ch. 428, § 1, eff from and after passage (approved April 23, 1988).

Cross References — Assignments of notes or other instruments of indebtedness, see § 75-13-1.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 872] does not apply to negotiable instruments. Hughes v. Kaw Inv. Co., 133 Miss. 48, 97 So. 465, 31 A.L.R. 727 (1923); Schwartz v. Smith, 134 Miss. 594, 99 So. 436 (1924).

Appointment of substitute trustee by assignee of debt valid, though assignment not noted on record. Scruggs v. Northern, 123 Miss. 169, 85 So. 89 (1920).

§ 89-5-19. When a lien appears by the record to be barred, it ceases.

Where the remedy to enforce any mortgage, deed of trust, or other lien on real or personal property which is recorded, appears on the face of the record to be barred by the statute of limitations (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), the lien shall cease and have no effect as to creditors and subsequent purchasers for a valuable consideration without notice, unless within six (6) months after such remedy is so barred the fact that such mortgage, deed of trust, or lien has been renewed or extended be entered on the margin of the record thereof, by the creditor, debtor, or trustee, attested by the clerk, or a new mortgage, deed of trust, or lien, noting the fact of renewal or extension, be duly filed for record within such time. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record the same shall be deemed to be due one (1) year from the date of the instrument securing the same for the purpose of this section. And where a suit shall have been brought to keep a judgment alive within seven (7) years from the rendition of such judgment, the general lien of such judgment shall expire as to creditors and subsequent purchasers for a valuable consideration, without notice, at the end of seven (7) years from the rendition of such judgment, notwithstanding such suit to keep alive the judgment unless a notation to keep alive such judgment shall be made on the judgment roll within six (6) months after the expiration of seven (7) years from the time of the rendition of such judgment.

SOURCES: Codes, 1892, § 2462; 1906, § 2796; Hemingway's 1917, § 2297; 1930, § 2154; 1942, § 875; Laws, 1896, ch. 98; Laws, 1956, ch. 215; Laws, 1958, ch. 271, § 1; Laws, 1960, ch. 223.

Cross References — Limitation of actions upon mortgages and deeds of trust generally, see §§ 15-1-1 et seq.

Requirement that discharge of lien be noted on record, see § 85-7-199.

Payment extinguishing mortgage, see § 89-1-49.

JUDICIAL DECISIONS

1. In general.
2. Persons and interests protected.
3. Renewal of mortgage.
4. Miscellaneous.

1. In general.

This section [Code 1942, § 875] has no application to judgment liens. Street v. Smith, 85 Miss. 359, 37 So. 837 (1905).

Where the debtor in a trust deed dies before the debt is barred, this section [Code 1942, § 875] does not prevent extension for one year of time to sue, provided for by another statutory provision. Klaus v. Moore, 77 Miss. 701, 27 So. 612 (1900).

This section [Code 1942, § 875] has no application to renewals or extensions made before it went into effect. Drane v. Newsom, 73 Miss. 422, 19 So. 200 (1896).

2. Persons and interests protected.

Where note secured by deed of trust was extended from time to time, but fact of extensions was not noted on margin of record of deed of trust before remedy to enforce it appeared on face of record to be barred, or within six months thereafter, such extensions did not affect rights of subsequent creditors without notice of extensions. Lampton-Reid Co. v. Allen, 177 Miss. 698, 171 So. 780 (1937).

That junior lien attached before bar of limitations attached to prior deed of trust did not affect right of junior lienor's transferees who purchased for valuable consideration the note and security and had no notice that lien had not been extinguished, and parted with something of value, and hence became "creditors" or "subsequent purchasers" within statute providing that recorded lien should have no effect as to creditors and subsequent purchasers where remedy thereof was barred by limitation. Lampton-Reid Co. v. Allen, 177 Miss. 698, 171 So. 780 (1937).

"Creditor" or "subsequent purchaser" within statute is person who has parted with something of value on appearance of record, so that apparent bar cannot be availed of by one who became junior lienor before bar attached, and while notice imparted by recorded instrument was in full force. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

Person who became judgment creditor of mortgagor before bar of limitations against enforcement of lien by mortgagee appeared of record held not "creditor" or "subsequent purchaser" within statute. Richter Phillips Co. v. Phillips, 175 Miss. 242, 166 So. 393 (1936).

This section [Code 1942, § 875] protects only creditors and purchasers who parted with something of value on faith of the appearance of the record. Klaus v. Moore, 77 Miss. 701, 27 So. 612 (1900).

3. Renewal of mortgage.

Where mortgaged property conveyed by mortgagor, subsequent renewal of mortgage does not relieve property of prior lien. Smith v. Childress, 119 Miss. 20, 80 So. 345 (1919).

Renewal of first mortgage does not render lien of same subordinate to that of a second mortgage. Bank of Lexington v. Cooper, 115 Miss. 782, 76 So. 659 (1917), motion granted, 77 So. 914 (Miss. 1918).

4. Miscellaneous.

Where senior mortgage and notes secured thereby were barred, neither junior mortgagee nor one claiming under him was bound to know any facts not of record, nor estopped to claim priority, nor to assert that attempted revival of senior mortgage was void. Musser v. First Nat'l Bank, 165 Miss. 873, 147 So. 783 (1933).

Where no effort was made to renew or extend notes or mortgage securing them until after notes were barred, right and remedy as to notes and mortgage were barred, and could not be revived. Musser v. First Nat'l Bank, 165 Miss. 873, 147 So. 783 (1933).

Statute held not available to one giving deed of trust or note. Mason v. Stroud, 155 Miss. 829, 125 So. 408 (1930).

Writ of garnishment could not be issued on old judgment after seven years, though suit on judgment was commenced before seven years expired. Buckley v. F.L. Riley Mercantile Co., 155 Miss. 150, 124 So. 267 (1929).

Trustee's deed to purchaser showing on its face that sale was made after it was barred by statute of limitation held valid, where marginal reference was made within 6 months showing renewal of original indebtedness. McBride v. Burgin, 142 Miss. 859, 108 So. 148 (1926), motion granted, 143 Miss. 596, 108 So. 811 (1926).

In a mortgagee's declaratory judgment action, seeking subordination or extinguishment of 2 Small Business Administration liens against the mortgaged property, Mississippi law (§ 89-5-19) would be applied as the federal rule for establishing the relative priority of competing federal and private liens. Barhorst v. Armstrong, 42 F. 2 (C.C.D. Ohio 1890).

ATTORNEY GENERAL OPINIONS

In searching the records to determine the names and address of mortgagees pursuant to the mandatory provisions of Section 27-43-5, a clerk may rely upon the provisions of Section 89-5-19; he may consider as barred any lien which as of the date of the search appears to have been barred pursuant to the applicable statute of limitation at least six months prior to the date of the search for the debt secured thereby; and he need not give notice of the maturity of a tax sale to any mortgagee whose lien appears to be barred. McAdams, Feb. 18, 2000, A.G. Op. #2000-0055.

RESEARCH REFERENCES

ALR. Reinstatement and restoration of mortgages released or discharged without authorization, as against subsequent purchasers, lienholders, judgment creditors, and the like, without notice. 35 A.L.R.2d 948.

Am Jur. 51 Am. Jur. 2d, Limitation of Actions § 29.

CJS. 54 C.J.S., Limitation of Actions §§ 17, 52, 71 et seq.

§ 89-5-21. Entry of satisfaction upon record of mortgage or deed of trust.

(1) Except as otherwise provided in subsections (3), (4) and (5), any mortgagee or cestui que trust, or assignee of any mortgagee or cestui que trust, of real or personal estate, having received full payment of the money due by the mortgage or deed of trust, shall enter satisfaction upon the margin of the record of the mortgage or deed of trust, which entry shall be attested by the clerk of the chancery court and discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revest in the grantor.

(2) Any such mortgagee or cestui que trust, or such assignee, by himself or his attorney, who does not, after payment of all sums owed, within one (1) month after written request, cancel on the record the mortgage or deed of trust shall forfeit the sum of Two Hundred Dollars ($200.00), which can be recovered by suit on part of the party aggrieved, and if after request, he fails or refuses to make such acknowledgment of satisfaction, the person so neglecting or refusing shall forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by action; but such entry of satisfaction may be made by anyone authorized to do it by the written authorization of the mortgagee or beneficiary, duly acknowledged and recorded, and shall have the same effect as if done by the mortgagee or beneficiary.

(3) With respect to a mortgage or deed of trust which states on its face that it secures a line of credit, satisfaction of record shall be accomplished and extinguishment shall occur as provided in subsection (5).

(4) As used in this section, the term "line of credit" means any loan, extension of credit or financing arrangement where the lender has agreed to make additional or future advances.

(5) Any mortgagee or cestui que trust, or the assignee of a mortgagee or cestui que trust, under a mortgage or deed of trust securing a line of credit shall, upon (a) the termination or maturity of the line of credit and the payment of all sums owing in connection with the line of credit, or (b) the payment of all sums owing in connection with the line of credit and a written request by the debtor to cancel the line of credit and the mortgage or deed of trust securing the line of credit, enter satisfaction upon the margin of the record of the mortgage or deed of trust, which entry shall be attested by the clerk of the chancery court and discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revest in the grantor. For the purpose of this subsection (5), the requirement of a written request by the debtor may be satisfied by a prospective creditor's delivery of a document, signed by the debtor, requesting cancellation of the line of credit and the mortgage or deed of trust securing the line of credit.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (33, 34); 1857, ch. 36, art. 14; 1871, § 2297; 1880, § 1206; 1892, § 2451; 1906, § 2781; Hemingway's 1917, § 2285; 1930, § 2155; 1942, § 876; Laws, 1948, ch. 233, § 1; Laws, 1995, ch. 497, § 2; Laws, 1999, ch. 570, § 2; Laws, 2000, ch. 580, § 2, eff from and after passage (approved May 20, 2000).

Cross References — Requirement that discharge of lien be noted on record, see § 85-7-199.

Extinguishment of mortgage or deed of trust, see § 89-1-49.

Acknowledgment of satisfaction by trustee, see § 89-1-51.

JUDICIAL DECISIONS

1. In general.
2. Recovery of penalty.
3. Miscellaneous.

1. In general.

Statute providing penalty for failure to cancel mortgage after payment is penal and strictly construed against party aggrieved. Brown v. Yarbrough, 130 Miss. 715, 94 So. 887 (1923).

Section [Code 1942, § 876] applies to deeds of trust on personalty. Coon v. Robinson Mercantile Co., 110 Miss. 700, 70 So. 884 (1916).

Action may be brought under this section [Code 1942, § 876] although mortgage in describing property gave lot number and addition but omitted block number. Pierce v. Kingston Lumber Co., 90 Miss. 216, 43 So. 81 (1907).

The case must fall literally within the act. British & Am. Mtg. Co. v. Burke, 80 Miss. 643, 32 So. 51 (1902).

The right to the penalty prescribed by this section [Code 1942, § 876] depends upon strict compliance with the statute. Requests which are not literally correct will not support an action for failure to acknowledge satisfaction of the mortgage. British & Am. Mtg. Co. v. Burke, 80 Miss. 643, 32 So. 51 (1902); Lutz v. Hartman Mercantile Co., 41 So. 1039 (Miss. 1906).

2. Recovery of penalty.

Under statute mortgagor could recover actual damages for delay, and additional penalty where failure to cancel was due to mortgagee's gross negligence. Dawkins v. Federal Land Bank, 170 Miss. 701, 155 So. 166 (1934).

Whether delay in cancellation was due to request of plaintiff held for jury. Dawkins v. Federal Land Bank, 170 Miss. 701, 155 So. 166 (1934).

Cestui que trust not cancelled in trust deed on request believing clerk would cancel it, on presenting cancelled note, held not subject to penalty. Johns v. Ferguson, 153 Miss. 807, 121 So. 485 (1929).

Statement held not sufficient request for cancellation to authorize recovery of penalty. Freeman v. McCormick Motorcar Co., 153 Miss. 474, 121 So. 138 (1929).

Where crops grown on rented land were delivered to mortgagor with landlord's consent, in payment of debt, mortgagor was liable for failure to enter satisfaction on margin of record. Coon v. Robinson Mercantile Co., 110 Miss. 700, 70 So. 884 (1916).

3. Miscellaneous.

Company acquiring through mesne conveyances realty sold by insane person's guardian after releases thereof by court orders from recorded trust deed substituted for trust deeds, released on record by trustees, as security for loan of ward's funds to guardian, held without constructive notice of such instruments and hence not liable for balance due ward from guardian, where substituted deed erroneously described property. Pan-American Life Ins. Co. v. Crymes, 169 Miss. 701, 153 So. 803 (1934).

Where appellee objected below to introduction of trust deed releases because not made exhibits to answer on cross-bill, objection that no entry was made on margin of record held unavailable in supreme court. Hardin v. West, 163 Miss. 839, 143 So. 697 (1932).

Title of assignees of second trust deed held dependent upon validity of fraudulent cancellation of first trust deed by trustee. Eagle Lumber & Supply Co. v. De Weese, 163 Miss. 602, 135 So. 490 (1931).

Where trustee in trust deed satisfied trust deed on record and took second trust deed, payable to himself and assigned latter to secure his individual indebtedness, assignees were charged constructively with notice that second trust deed omitted name of real beneficiary. Eagle Lumber & Supply Co. v. De Weese, 163 Miss. 602, 135 So. 490 (1931).

Cancellation of mortgage without attestation by clerk held not constructive notice. Felt v. Covington, 134 Miss. 466, 99 So. 1 (1924).

Statement at beginning of tax deed that "I, Lent I. Rice, the tax collector of the county of Tallahatchie, did" sell the land, not a signature of deed. Rainey v. Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367 (1908).

RESEARCH REFERENCES

ALR. Requiring security as condition of canceling of record mortgage or lien, or of recording payment. 2 A.L.R.2d 1064.

Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom. 8 A.L.R.4th 853.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 404, 420 et seq.

13 Am. Jur. Legal Forms 2d, Mortgages § 179:579.1.

CJS. 59 C.J.S., Mortgages §§ 593 et seq.

Law Reviews. The effect of bankruptcy and encumbrances on mineral interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 89-5-23. Oil, gas, and mineral leases; cancellation of record upon expiration.

(1) Whenever any oil, gas and mineral lease which is now or may hereafter be recorded in any county of this state shall expire or terminate, the holder of such oil, gas and mineral lease, or the last assignee of record thereof, as the case may be, shall be required to cancel of record such oil, gas and mineral lease by entering upon the margin of the record of such lease, a

notation that said oil, gas and mineral lease has terminated and expired, which entry shall be attested by the clerk of the chancery court and shall discharge and release the lands therein described from said oil, gas and mineral lease; or the holder or last assignee of record, as the case may be, of an oil, gas and mineral lease may execute an instrument, duly recordable under the laws of this state, stating that the said oil, gas and mineral lease has expired and terminated and that no further rights or claims will be asserted thereunder.

The chancery clerk shall be allowed a fee of One Dollar ($1.00) for making such cancellation, and shall not be required to index same on sectional index but shall be required to note the cancellation on the margin of the record where said lease is recorded and if said cancellation is by separate instrument he shall note the cancellation on the margin where lease is recorded showing book and page of said instrument of cancellation.

(2) If the holder of an oil, gas and mineral lease or the last assignee of record, as the case may be, shall not, within one (1) month after written request made by the lessor or his assigns, cancel on the record said oil, gas and mineral lease, or furnish proof, as above provided, that the same has expired and terminated, the lessee or the last assignee of record, as the case may be, of such oil, gas and mineral lease, shall forfeit the sum of One Hundred Dollars ($100), which may be recovered by suit on the part of the party aggrieved.

SOURCES: Codes, 1942, § 876-01; Laws, 1944, ch. 195, §§ 1, 2.

§ 89-5-24. Form of certain documents or instruments presented for recording; contents; exempt documents or instruments; additional recording fee for nonconforming documents or instruments.

[Effective until July 1, 2012, this section shall read:]

(1) Except as otherwise provided in subsections (3) and (4), any document or instrument presented to the clerk of the chancery court for recording shall meet the following requirements:

(a) Each document or instrument shall consist of one or more individual pages printed only on one (1) side. The document or instrument shall not consist of pages that are permanently bound or in a continuous form and shall not have any attachment stapled or otherwise affixed to any page except as necessary to comply with statutory requirements. However, the individual pages of a document or instrument may be stapled together for presentation for recording. A label that is firmly attached with a bar code or return address may be accepted for recording.

(b) All documents must be printed or typed in a font no smaller than eight (8) point in size. If a document or instrument, other than a plat or survey or a drawing related to a plat or survey, presented for recording contains type smaller than eight (8) point type, the document or instrument shall be accompanied by an exact typewritten or printed copy that meets the requirements of this section.

(c) Each document shall be of sufficient legibility to produce a clear reproduction. If a document or instrument, other than a plat or survey or a drawing related to a plat or survey, is not sufficiently legible to produce a clear reproduction, the document or instrument shall be accompanied by an exact typewritten or printed copy that meets the type size requirements of paragraph (b) and shall be recorded contemporaneously as additional pages of the document or instrument.

(d) Each document or instrument, other than a plat or survey or a drawing related to a plat or survey, shall be on white paper of not less than twenty-pound weight. All text within the document or instrument shall be of sufficient color and clarity to ensure that the text is readable when reproduced from the record.

(e) All signatures on a document or instrument shall be in black or blue ink and of sufficient color and clarity to ensure that the signatures are of sufficient legibility to produce a clear reproduction when the document or instrument is reproduced from the record. The corresponding name shall be typed, printed or stamped beneath the original signature. The typing or printing of a name or the application of an embossed or inked stamp shall not cover or otherwise materially interfere with any part of the document or instrument except where provided by law. Failure to print or type signatures as required in this paragraph does not invalidate the document or instrument.

(f) The first page of each document or instrument, other than a plat or survey or a drawing related to a plat or survey, shall have a top margin of at least three (3) inches of vertical space from left to right which shall be reserved for the recorder's use. All other margins on the document or instrument shall be a minimum of three-fourths (¾) of one (1) inch. Nonessential information including, but not limited to, form numbers or customer notations may be placed in a margin other than the top margin. A document may be recorded if a minor portion of a seal or incidental writing extends into a margin. The recorder shall not incur any liability for failure to show a seal or information that extends beyond the margin of the permanent archival record.

(2) Each document or instrument, other than a plat or survey or a drawing related to a plat or survey, that is presented for recording and that contains any of the following information shall have that information on the first page below the three-inch margin:

(a) The name, address and telephone number of the individual who prepared the document.

(b) A return address.

(c) The title of the document or instrument.

(d) All grantors' names.

(e) All grantees' names.

(f) Any address and telephone number required by Section 27-3-51, Mississippi Code of 1972.

(g) The legal description of the property or indexing instruction per Section 89-5-33(3). If there is insufficient space on the first page for the entire legal description or the entire indexing instruction, immediately succeeding pages shall be used.

(3) The following documents or instruments are exempt from the format requirements of this section:

(a) A document or instrument that was executed before July 1, 2009.

(b) A military separation document or instrument.

(c) A document or instrument executed outside the United States.

(d) A certified copy of a document or instrument issued by a court or governmental agency, including a vital record.

(e) A document or instrument where one (1) of the original parties is deceased or otherwise incapacitated.

(f) A document or instrument formatted to meet court requirements.

(g) A federal tax lien.

(h) A filing under the Uniform Commercial Code.

(4) The recorder shall record a document or instrument that does not substantially conform to the format standards specified in subsections (1) and (2) of this section upon payment of an additional recording fee of Ten Dollars ($10.00) per document or instrument. The fee shall be charged only for documents or instruments dated on or after July 1, 2009; this fee may not be charged for those documents or instruments specifically exempted in subsection (3).

(5) Failure to conform to the format standards specified in this section does not affect the validity or enforceability of the document or instrument.

[Effective from and after July 1, 2012, this section shall read:]

(1) Except as otherwise provided in subsections (3) and (4), any document or instrument presented to the clerk of the chancery court for recording shall meet the following requirements:

(a) Each document or instrument shall consist of one or more individual pages printed only on one (1) side. The document or instrument shall not consist of pages that are permanently bound or in a continuous form and shall not have any attachment stapled or otherwise affixed to any page except as necessary to comply with statutory requirements. However, the individual pages of a document or instrument may be stapled together for presentation for recording. A label that is firmly attached with a bar code or return address may be accepted for recording.

(b) All documents must be printed or typed in a font no smaller than ten (10) point in size. If a document or instrument, other than a plat or survey or a drawing related to a plat or survey, presented for recording contains type smaller than ten-point type, the document or instrument shall be accompanied by an exact typewritten or printed copy that meets the requirements of this section.

(c) Each document shall be of sufficient legibility to produce a clear reproduction. If a document or instrument, other than a plat or survey or a drawing related to a plat or survey, is not sufficiently legible to produce a clear reproduction, the document or instrument shall be accompanied by an exact typewritten or printed copy that meets the type size requirements of paragraph (b) and shall be recorded contemporaneously as additional pages of the document or instrument.

(d) Each document or instrument, other than a plat or survey or a drawing related to a plat or survey, shall be on white paper of not less than twenty-pound weight. All text within the document or instrument shall be of sufficient color and clarity to ensure that the text is readable when reproduced from the record.

(e) All signatures on a document or instrument shall be in black or blue ink and of sufficient color and clarity to ensure that the signatures are of sufficient legibility to produce a clear reproduction when the document or instrument is reproduced from the record. The corresponding name shall be typed, printed or stamped beneath the original signature. The typing or printing of a name or the application of an embossed or inked stamp shall not cover or otherwise materially interfere with any part of the document or instrument except where provided by law. Failure to print or type signatures as required in this paragraph does not invalidate the document or instrument.

(f) The first page of each document or instrument, other than a plat or survey or a drawing related to a plat or survey, shall have a top margin of at least three (3) inches of vertical space from left to right which shall be reserved for the recorder's use. All other margins on the document or instrument shall be a minimum of three-fourths (¾) of one (1) inch. Nonessential information including, but not limited to, form numbers or customer notations may be placed in a margin other than the top margin. A document may be recorded if a minor portion of a seal or incidental writing extends into a margin. The recorder shall not incur any liability for failure to show a seal or information that extends beyond the margin of the permanent archival record.

(2) Each document or instrument, other than a plat or survey or a drawing related to a plat or survey, that is presented for recording and that contains any of the following information shall have that information on the first page below the three-inch margin:

(a) The name, physical business mailing address and business or employment telephone number of the individual who prepared the document and of every grantor, grantee, borrower, beneficiary, trustee or other party to the instrument.

(b) A return address.

(c) The title of the document or instrument.

(d) Any address and telephone number required by Section 27-3-51, Mississippi Code of 1972.

(e) The legal description of the property or indexing instruction per Section 89-5-33(3). If there is insufficient space on the first page for the entire legal description or the entire indexing instruction, immediately succeeding pages shall be used.

(3) The following documents or instruments are exempt from the format requirements of this section:

(a) A document or instrument that was executed before July 1, 2009.

(b) A military separation document or instrument.

(c) A document or instrument executed outside the United States.

(d) A certified copy of a document or instrument issued by a court or governmental agency, including a vital record.

(e) A document or instrument where one (1) of the original parties is deceased or otherwise incapacitated.

(f) A document or instrument formatted to meet court requirements.

(g) A federal tax lien.

(h) A filing under the Uniform Commercial Code.

(4) The recorder shall record a document or instrument that does not substantially conform to the format standards specified in subsections (1) and (2) of this section upon payment of an additional recording fee of Ten Dollars ($10.00) per document or instrument. The fee shall be charged only for documents or instruments dated on or after July 1, 2009; this fee may not be charged for those documents or instruments specifically exempted in subsection (3).

(5) Failure to conform to the format standards specified in this section does not affect the validity or enforceability of the document or instrument.

SOURCES: Laws, 2008, ch. 508, § 1; Laws, 2011, ch. 416, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2011 amendment effective from and after July 1, 2012, substituted "ten (10) point" for "eight (8) point" in (1)(b); rewrote (2)(a); and deleted former (2)(d) and (e), which read: "All grantors' names" and "All grantees' names; and redesignated former (2)(f) and (g) as present (2)(d) and (e)."

§ 89-5-25. How instrument recorded and indexed; records public; copies.

(1) It shall be the duty of the clerk of the chancery court to whom any written instrument is delivered to be recorded, and which is properly recordable in his county, to record the same without delay, together with the acknowledgments of proofs and the certificates thereof, and also the plats of surveys, schedules, and other papers thereto annexed, by entering them word for word in a fair handwriting, or typewriting, or by filling up printed forms, or by recording by photostat machine or other equally permanent photographic or electronic process, and entering the hour and minute, the day of the month, and the year when the instrument was delivered to him for record, and when recorded. Records filed or stored electronically may be in addition to, or in lieu of, the physical record on paper. He shall also carefully preserve all instruments of writing, which are properly acknowledged and delivered to him to be recorded, and after recording deliver them to the party entitled thereto on demand. He shall also put a complete alphabetical index, both direct and reverse, to each book, except as provided in subsection (2), herein; and every person shall have access, at proper times, to such books, and be entitled to transcripts from the same on paying the lawful fees. He shall record the deeds

and other instruments in the order of time in which they are filed for record as far as practicable.

(2) In counties having a population in excess of one hundred nineteen thousand (119,000) with an assessed valuation of all taxable property therein in excess of Sixty-three Million Dollars ($63,000,000.00), and having two (2) cities wholly located therein, each with a population in excess of thirty thousand (30,000) persons according to the preceding Federal Census, wherein the clerk of the chancery court has a well kept general index, both direct and reverse, for each kind or class of record books as required by Section 89-5-33, the board of supervisors may, by order spread upon its minutes, authorize the clerk of the chancery court to omit putting such index in each separate book of the records to which such general index is kept.

(3) This section shall not be construed to authorize and empower the boards of supervisors to purchase any photostat machines or other equally permanent photographic or electronic processes.

(4) From and after July 1, 2009, instruments to be recorded shall comply with the provisions of Section 89-5-24.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (8); 1857, ch. 36, art. 35; 1871, § 2318; 1880, § 1225; 1892, § 2474; 1906, § 2808; Hemingway's 1917, § 2309; 1930, § 2157; 1942, § 878; Laws, 1944, ch. 196, §§ 1, 2; Laws, 1962, ch. 239; Laws, 1994, ch. 521, § 40; Laws, 2008, ch. 508, § 2, eff from and after July 1, 2009.

Cross References — Duties of chancery clerk generally, see §§ 9-5-135, 9-5-137.
Lost records, see §§ 25-55-1 et seq.
Recording of releases of powers of appointment, see § 91-15-17.

JUDICIAL DECISIONS

1. In general.
2. Priority.

1. In general.

Looseleaf book held "well-bound book" within statute. Richardson v. Woolard, 133 Miss. 417, 97 So. 808 (1923).

2. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, because the judgment creditors' liens were filed before the refinancing mortgage was filed, and they attached upon the property being reconveyed from the minor back to the debtor, under Miss. Code Ann. §§ 89-5-3, 89-5-25, the bank was last in priority. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

RESEARCH REFERENCES

ALR. Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract. 50 A.L.R.4th 314.

§ 89-5-27. Receipt for instruments delivered to chancery clerk for recording.

The clerk of the chancery court, or his deputy, shall give a receipt for every written instrument delivered to him to be recorded, if demanded, in which he shall state the name of the parties, the date of delivery and quantity of land or other property therein specified, and shall also certify on or under such instrument the hour and minute, the day and month, and the year when he received it; and when the same is recorded, he shall make an appropriate reference where it is recorded, and an itemized statement of his fees therefor, and he shall deliver it to the party entitled to receive it when called for.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (10); 1857, ch. 36, art. 36; 1871, § 2319; 1880, § 1223; 1892, § 2471; 1906, § 2805; Hemingway's 1917, § 2306; 1930, § 2156; 1942, § 877; Laws, 1924, ch. 228; Laws, 1928, ch. 199; Laws, 1952, ch. 342; Laws, 1994, ch. 521, § 41, eff from and after passage (approved March 25, 1994).

§ 89-5-29. Mortgages and deeds of trust on land; how recorded.

Except as hereinafter provided, all mortgages and deeds of trust upon land given to secure the payment of money, and all instruments of writing whereby a trustee is substituted under any such deed of trust, and all instruments of writing canceling or satisfying, or authorizing the cancellation or satisfaction of any such mortgage or deed of trust, shall be recorded separately from other instruments relating to land or records, and such records shall be called "records of mortgages and deeds of trust on land."

SOURCES: Codes, 1906, § 2809; Hemingway's 1917, § 2310; 1930, § 2158; 1942, § 879; Laws, 1994, ch. 521, § 42, eff from and after passage (approved March 25, 1994).

JUDICIAL DECISIONS

1. In general.

Recordation of real estate mortgages and deed of trust of land in the chattel deed records is ineffectual. Seal v. Anderson, 235 Miss. 249, 108 So. 2d 864 (1959).

Recording appointment of substituted trustee in deed book instead of mortgage records held a compliance with statute. Camp v. Celtic Land & Imp. Co., 129 Miss. 417, 91 So. 897 (1922).

RESEARCH REFERENCES

ALR. Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract. 50 A.L.R.4th 314.

Am Jur. 55 Am. Jur. 2d, Mortgages §§ 404, 420 et seq.

CJS. 59 C.J.S., Mortgages §§ 257 et seq.

§ 89-5-31. Repealed.

Repealed by Laws, 1993, ch. 546, § 2, eff from and after January 1, 1994.

[Codes, 1906, § 2810; Hemingway's 1917, § 2311; 1930, § 2159; 1942, § 880; Laws, 1946, ch. 172, § 1]

Editor's Note — Former section 89-5-31 provided for the indexing of mortgages and deeds of trust on land. Similar provisions may now be found in section 89-5-33.

§ 89-5-33. General index; direct and reverse.

(1) The clerk of the chancery court shall provide a general index, direct and reverse, on which shall be entered, in regular alphabetical order under the appropriate letter, the name of each maker of the instrument and the name of each person to whom made; and in like alphabetical order under its appropriate title shall be entered the name of each person to whom the instrument is made and the name of each person by whom made. A general index, both direct and reverse, of mortgages and deeds of trust on land shall be kept separate from the general index to other records which the chancery clerk is required to keep, and he shall make the proper entries in it as he is required to make in the other general index. Immediately on receipt of any instrument to be recorded, the clerk shall make these entries in the appropriate general index and, after recording the instrument, the book and page in which the record is made shall be noted opposite each name thus placed in such general index, both direct and reverse.

(2) The clerk of the chancery court shall maintain a sectional index to instruments describing land which are also entered in the general index. Each entry shall state the name of each maker of the instrument, the name of each person to whom made, and the date, type of instrument and the appropriate reference where recorded. Opposite each such entry, the sectional index shall indicate the location of the land described in the instrument (a) by quarter section or governmental lot or other applicable subdivision of each section, township and range established by governmental survey, or (b) by lot number for platted subdivisions, official surveys, and unofficial subdivisions and surveys commonly in use. The clerk may elect to keep the sectional index by quarter-quarter section rather than by the quarter section, but shall not require a preparer's indexing instruction to describe the quarter-quarter section. Except as otherwise provided in this section, every instrument describing land and required to be entered in the general index shall also be entered in the sectional index. In the event of conflict between the general and the sectional indices, the notice imparted by the general index shall prevail except to the extent the land is described by lot number for platted subdivisions, official surveys, and unofficial subdivisions and surveys commonly in use, the sectional index shall prevail.

(3) Every surveyor or other person who prepares a legal description of land or who prepares an instrument utilizing an existing description and every person who prepares a deed of trust shall (except as herein provided) include an indexing instruction which shall state the section, township and range and one or more quarter sections or governmental lots or other applicable subdivisions of each section in which the land is located. The preparer, at his option,

may elect to note the quarter-quarter section in which the land is located, but shall not be required to do so. However, if the section or quarter sections or governmental lots or other applicable subdivisions of the section cannot feasibly be determined by such surveyor or other person, the indexing instruction shall contain a statement to that effect and shall then state all of the sections and quarter sections or governmental lots or other applicable subdivisions of the section in which the described land could possibly be located. The indexing instruction shall be distinctly set apart in the instrument so as to be readily apparent to the chancery clerk. A chancery clerk shall refuse to accept delivery of an instrument which does not contain the indexing instruction required in this section unless the instrument otherwise discloses the information required to be included in an indexing instruction. To be accepted for recording, an instrument shall state the name, address and telephone number of the person, entity or firm preparing it. If prepared by an attorney, the instrument shall also include the attorney's Mississippi bar number. The fact that the indexing instruction or preparer information may be omitted, incorrect, incomplete or false shall not invalidate the instrument or the filing thereof for record. The chancery clerk shall enter the instrument in the sectional index according to the indexing instruction, or equivalent information if accepted for filing without an indexing instruction, and shall make no entries under any other quarter sections or governmental lots or subdivisions of the section. Notwithstanding the foregoing, the following kinds of instruments shall be indexed as stated:

(a) Instruments describing land by reference to officially platted subdivisions or to official surveys or to unofficial subdivisions and surveys commonly in use will not require an indexing instruction and shall be indexed in the general index and the sectional index for such subdivision or survey without further requirement.

(b) Instruments describing land or interests in land solely by reference to previously recorded instruments or affecting previously recorded instruments shall not require an indexing instruction and need not be entered in the sectional index but shall be entered in the general index and noted on the margin of the previously recorded instrument. Instruments describing land or interests in land by specific description of certain parcels and, for other parcels, by reference to previously recorded instruments, shall be entered in the sectional index according to the indexing instruction for the specific description and also noted on the margin of the previously recorded instrument, in addition to the general index.

(c) Instruments containing blanket descriptions of all land within a stated geographic area without specific description shall be entered in a separate part of the sectional index or in an index of indefinite records or an index of blanket conveyances in addition to the general index.

(d) Instruments describing land in irregular sections (all or any part of a section not capable of being divided into quarter sections for indexing purposes) shall be entered in the general index and in an appropriate sectional index maintained by the chancery clerk. The indexing instruction, however, shall be proper and complete if it states no more than the number of the irregular section or sections in which the land is located or, as above provided, in which the land could possibly be located. When an instrument describes land within an irregular section according to officially platted subdivisions or to official surveys or to unofficial subdivisions or surveys commonly in use, it shall be indexed in the sectional index for such subdivisions or surveys.

(4) When an instrument has been restored to service from microfilm or other archived record, the chancery clerk shall enter a notation on the margin stating that it is a substituted record and stating the date on which it was restored to service. Such marginal notation shall then constitute notice that the general index must be examined for instruments filed prior to such date which may have been noted on the margin of the original record but do not appear on the margin of the restored record.

(5) The clerk of the chancery court shall enter instruments in the sectional index by the end of the twentieth day the office is open following the day on which the instrument is filed, except for records of tax sales.

(6) If the chancery clerk elects to abbreviate the names of parties to an instrument in the indices, the clerk shall maintain a list of standard abbreviations used for that purpose and shall adhere to such list.

(7) The clerk of the chancery court shall not correct or alter an entry made in any index, whether kept manually or by computer, unless the date and time of the change is clearly disclosed on the revised record.

(8) If insufficient space is available for making entries on the margin of a recorded instrument, the chancery clerk may enter on the margin a reference where a continuation sheet is located.

(9) Except as expressly provided herein, nothing contained in this section shall be construed to modify the requirements of other statutes regarding the duties of the clerk of the chancery court to index and record instruments affecting the title to land.

SOURCES: Codes, 1871, § 2320; 1880, § 1224; 1892, § 2472; 1906, § 2806; Hemingway's 1917, § 2307; 1930, § 2160; 1942, § 881; Laws, 1993, ch. 546, § 1; Laws, 1994, ch. 521, § 43; Laws, 2008, ch. 356, § 1; Laws, 2009, ch. 442, § 1, eff from and after July 1, 2009.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in subsection (3). In the third sentence of (3), an apparent typographical error was corrected by substituting "determined by such survey or other person" for "determined by such survey or other person." The Joint Committee ratified the correction at its April 26, 2001, meeting.

Subsequently a publishing error was corrected by substituting the word "surveyor" for "survey" so that the phrase read "determined by such surveyor or other person."

Editor's Note — Laws of 1993, ch. 546, § 3, effective January 1, 1994, provides as follows:

"SECTION 3. Nothing in this act shall be construed to require chancery clerks to alter records filed prior to January 1, 1994, nor shall this act be construed to affect land titles prior to January 1, 1994."

Amendment Notes — The 2009 amendment added the seventh sentence in (3).

Cross References — Filing of brownfield agreements, see § 49-35-17.

Persons who for compensation write deeds of conveyance, deeds of trust, mortgages or contracts, or make or certify abstracts of title to certain real estate, held to be engaged in the practice of law, see § 73-3-55.

Recording of release of power of appointment, see § 91-15-17.

ATTORNEY GENERAL OPINIONS

Statute does not require cancellations or assignments of deed of trust to bear legal description but it does require that any person who prepares an instrument "utilizing an existing description" to include an indexing instruction for sectional index. Amos, March 2, 1994, A.G. Op. #94-0070.

Chancery Clerk of county could use proposed parcel numbers system as official sectional index of county without being in violation of Section 89-5-33. O'Beirne, March 9, 1994, A.G. Op. #93-0971.

Chancery Clerk should not refuse to accept for recording instrument that does not have information required under 89-5-33(3) and no penalty should be imposed for accepting it. Thomas, March 9, 1994, A.G. Op. #94-0016.

Indexing information does not have to be part of legal description and can be stated in separate part of instrument or as exhibit. Thomas, March 9, 1994, A.G. Op. #94-0016.

If the records of the Chancery Clerk's Office are stored electronically and there is therefore no book and page, they may be assigned a properly indexed unique identifier which will make them readily accessible to the general public; such records must be cross-referenced as required by Section 89-5-33 and, also, any electronically maintained records must be accessible to the public in accordance with the Public Records Act. McAdams, Jan. 10, 2003, A.G. Op. #02-0760.

JUDICIAL DECISIONS

1. Conflict between indices.
2. Validity.

1. Conflict between indices.

Summary judgment was properly awarded to a bank in a company's suit alleging that it was a bona fide purchaser of property for value without notice of the bank's deed of trust because under Miss. Code Ann. § 89-5-33(2), the company had a duty to search the general index, as it prevailed over an incorrect entry in the sectional index. Alamac LLC v. Travelers Bank & Trust, 941 So. 2d 219 (Miss. Ct. App. 2006).

2. Validity.

Grant of summary judgment in favor of the neighbors in their action against other neighbors to have fences removed was appropriate under Miss. Code Ann. § 89-5-33(3) because the misnomer in the original deed transfer did not invalidate the restrictive covenants, and even if it had, the developer followed the necessary steps to correct the defect; accordingly, the other neighbors' argument that the deed transfers were invalid was without merit. Journeay v. Berry, 953 So. 2d 1145 (Miss. Ct. App. 2007).

§ 89-5-35. How certain conveyances indexed.

Every conveyance by a sheriff, constable, marshal, master, commissioner, executor, administrator, guardian, trustee, or other person, in an official or representative character, shall be indexed by the clerk in proper alphabetical order as the conveyance of each person who executed it, and, in like manner, as the conveyance of each person whose property is sold and conveyed; and, for failure herein, he shall be liable in damages and for a penalty of Two Hundred Dollars ($200.00) to any person sustaining damage by such failure.

SOURCES: Codes, 1880, § 1226; 1892, § 2473; 1906, § 2807; Hemingway's 1917, § 2308; 1930, § 2161; 1942, § 882.

Cross References — Conveyances by masters, commissioners, sheriffs and constables, see § 89-1-27.

Forms of conveyances by sheriffs, constables, or persons acting in representative or official character, see §§ 89-1-65, 89-1-67.

§ 89-5-37. Name of beneficiary must be disclosed in mortgage or deed of trust to be recorded; exception.

The clerk of the chancery court, or his deputy, shall not record any mortgage or deed of trust in which the name of the beneficiary is not disclosed therein, and if such instrument is recorded it shall not impart notice to anyone. But the preceding sentence shall not apply if the mortgage or deed of trust discloses as beneficiary the name of an agent or other representative designated as such of one or more holders of the secured indebtedness in which event there shall be no requirement to disclose the holders of promissory notes, bonds, certificates of participation, trustee's certificates or the like secured by the mortgage or deed of trust. The assignment or transfer of a secured indebtedness need not be filed for record nor entered on the margin of the record if the holder thereof is represented by an agent, trustee or the like disclosed as beneficiary in the mortgage or deed of trust.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (10); 1857, ch. 36, art. 36; 1871, § 2319; 1880, § 1223; 1892, § 2471; 1906, § 2805; Hemingway's 1917, § 2306; 1930, § 2156; 1942, § 877; Laws, 1924, ch. 228; Laws, 1928, ch. 199; Laws, 1952, ch. 342; Laws, 1988, ch. 428, § 2, eff from and after passage (approved April 23, 1988).

Cross References — Application of the exceptions provided in this section to the requirement that transfers of record-debts be noted on the record, see § 89-5-15.

Application of the exceptions provided in this section to the requirement that assignments of indebtedness be marked on the record, see § 89-5-17.

JUDICIAL DECISIONS

1. In general.

Tenant's goods and chattels, which he conveyed by recorded trust deed to trustee as security for indebtedness to decedent's estate, held subject to payment of rent, where landlord had no actual notice of such deed, which did not sufficiently disclose beneficiary to constitute constructive notice of its contents, and tenant represented throughout that goods were free from any lien. Life Ins. Co. v. Page, 178 Miss. 287, 172 So. 873 (1937).

Recorded trust deed, conveying chattels to trustee as security for indebtedness to estate of named decedent, did not sufficiently disclose beneficiary to constitute constructive notice of its contents. Life Ins. Co. v. Page, 178 Miss. 287, 172 So. 873 (1937).

Evidence held not to sustain finding that named mortgagee was not beneficiary as required for record to constitute notice defeating lien of mortgagor's trustee. National Stockyards Nat'l Bank v. Isaacs, 146 Miss. 369, 112 So. 1 (1927).

§ 89-5-39. Books of record not to be removed.

A book of record of conveyances shall not be removed by writ or subpoena duces tecum, or otherwise, before any court, out of the courthouse in which such record is kept, when a certified copy or transcript may be given in evidence.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (22); 1857, ch. 36, art. 34; 1871, § 2317; 1880, § 1228; 1892, § 2476; 1906, § 2813; Hemingway's 1917, § 2314; 1930, § 2164; 1942, § 885.

Cross References — Admissibility in evidence of certified copies of records, see §§ 13-1-77 et seq.

§ 89-5-41. Records in counties divided into two districts.

Where it is not now so provided by law, in any county divided into two (2) districts for circuit and chancery courts, the board of supervisors may, by an order entered on its minutes, to go into effect six (6) weeks thereafter, require the clerk of the chancery court to transcribe into new record books the record of all conveyances theretofore made, and record all conveyances thereafter made affecting property situated wholly or partly in the district not before having the records; and all conveyances shall thereafter be recorded only in the proper district. And the records of conveyances in such district shall be kept and have the same effect as if they were several counties.

SOURCES: Codes, 1892, § 2477; 1906, § 2814; Hemingway's 1917, § 2315; 1930, § 2165; 1942, § 886.

§ 89-5-43. Penalty on clerk for failure of duty.

Any clerk who shall refuse or fail to perform any of the duties herein required shall, for every such refusal or neglect, be liable on his official bond to any party injured for all damages which such party may have sustained by reason of the nonperformance of such duty.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (11); 1857, ch. 36, art. 37; 1871, § 2321; 1880, § 1229; 1892, § 2478; 1906, § 2815; Hemingway's 1917, § 2316; 1930, § 2166; 1942, § 887.

Cross References — Criminal penalty for failure to perform duty, see § 97-11-37.

§ 89-5-45. Substitution of trustee must appear of record; general substitution allowed for certain beneficiaries.

Sales of land made under deeds of trust by substituted trustees shall not convey the interest of the grantor or grantors therein, but shall be absolutely null and void, both at law and in equity, unless the substitution shall appear of record in the office of the chancery clerk of the county where the land is situated, and unless it shall so appear by being actually spread at large upon the record before the first advertisement or notice of sale shall have been posted or published; the filing for record or lodging with the clerk not being sufficient. Such substitution, however, may so appear by a separate instrument recorded as above set out in all respects, or a copy of such substitution may be recorded as above set out. Provided, however, that where the beneficiary named in the deed of trust is an agency of the United States or the State of Mississippi, a national or state chartered bank or savings and loan association, a federal land bank, a production credit association, or an insurance company, the beneficiary may substitute the trustee named therein and the trustee named in all deeds of trust held by such beneficiary in the county, by recording in the office of the chancery clerk in the county where the land encumbered is situated one (1) instrument designated as a general substitution. It shall not be necessary for the general substitution to identify individually deeds of trust affected, or the grantors therein, it being sufficient if the instrument recites the name and address of the beneficiary and declares that its purpose is to name a substitute trustee for all mortgages or deeds of trust held by the named beneficiary which are recorded in the county. All general substitutions shall be indexed by the chancery clerk in a separate book especially designated for such purpose.

SOURCES: Codes, 1906, § 2773; Hemingway's 1917, § 2277; 1930, § 2168; 1942, § 890; Laws, 1896, ch. 96; Laws, 1983, ch. 328, eff from and after July 1, 1983.

Cross References — Place of sale under execution, see § 13-3-161.
Sales under deeds of trust or mortgages generally, see § 89-1-55.

JUDICIAL DECISIONS

1. In general.
2. Right to appoint substituted trustee.
3. Recording of appointment of substituted trustee.
4. Effect of void sale.
5. Miscellaneous.

1. In general.

Recording means copying instrument into public records in book kept for purpose by or under superintendence of officer therefor. White v. Stennis, 151 Miss. 765, 118 So. 902 (1928).

Sale under trust deed by substituted trustee is void unless appointment recorded in chancery clerk's office in county of land's situs. Camp v. Celtic Land & Imp. Co., 129 Miss. 417, 91 So. 897 (1922).

Substitution must precede sale. Provine v. Thornton, 92 Miss. 395, 46 So. 950 (1908).

Instrument substituting trustee is of record from time delivered to clerk. Brown v. British Am. Mtg. Co., 86 Miss. 388, 38 So. 312 (1905).

Recording of instrument of substitution contemporaneous with sale complies with law. Brown v. British Am. Mtg. Co., 86 Miss. 388, 38 So. 312 (1905).

Failure to record substitution before sale renders sale void, though duly recorded thereafter. Hyde v. Hoffman, 31 So. 415 (Miss. 1902).

A sale of land under a deed of trust made by a duly appointed substituted trustee before his appointment was filed for record, is void, though the appointment was duly filed thereafter. Hyde v. Hoffman, 31 So. 415 (Miss. 1902).

Sale by substituted trustee void unless substitution placed of record before sale. Shipp v. New S. Bldg. & Loan Ass'n, 81 Miss. 17, 32 So. 904 (1902); Polk v. S.S. Dale & Sons, 93 Miss. 664, 47 So. 386 (1908).

Under this section [Code 1942, § 890], the writing appointing a substituted trustee must be of record before a valid sale under a trust deed can be made by him. White v. Jenkins, 79 Miss. 57, 28 So. 570 (1901); Shipp v. New S. Bldg. & Loan Ass'n, 81 Miss. 17, 32 So. 904 (1902).

2. Right to appoint substituted trustee.

The executor of the estate of the mortgagee in a deed of trust is empowered to appoint a substitute trustee where such power was specifically given in the deed trust to the mortgagee or his assignes. White v. Hesdorffer, 202 Miss. 711, 32 So. 2d 442 (1947).

Liquidating agent of insolvent bank held its legal representative within provision of deed of trust giving bank authority to substitute trustee. Stringer v. Price, 143 Miss. 189, 108 So. 431 (1926).

Provision that beneficiary, executor, administrator, or assigns, under his hand and seal, could appoint substitute trustee, did not require substitution under hand and seal of original beneficiary but could be done by assignee. Scruggs v. Northern, 123 Miss. 169, 85 So. 89 (1920).

Provision of deed of trust that beneficiary, assignee, or legal representative might appoint another trustee, where trustee refused to act, gave corporation assignee right to appoint substituted trustee. West v. Union Naval Stores Co., 117 Miss. 153, 77 So. 961 (1918).

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives." Allen v. Alliance Trust Co., 84 Miss. 319, 36 So. 285 (1903).

3. Recording of appointment of substituted trustee.

Substitution of the trustee under a deed of trust of land should be recorded in the records of mortgages and deeds of trust on land, rather than in the chattel mortgages and deeds of trust records. Seal v. Anderson, 235 Miss. 249, 108 So. 2d 864 (1959).

Placement of the name of the county in the space provided for that of the substituted trustee and the name of the substituted trustee in the space provided for the county in a substitution of trustee in a deed of trust referred to by book and page, there being two pages in the book numbered the same as that specified in the substitution, violated strict compliance with this section [Code 1942, § 890] and probably so deterred the average layman from bidding at a subsequent foreclosure sale as to render the sale voidable. Federal Land Bank v. Collom, 201 Miss. 266, 28 So. 2d 126 (1946).

Where substitution of trustee under trust mortgage was pasted or written on margin of record of mortgage before first notice of foreclosure sale was posted or published, foreclosure by substituted trustee was valid. Federal Land Bank v. McCraney, 171 Miss. 191, 157 So. 248 (1934).

Attorney's copying substitution of trustees in deed of trust book, neither beneficiary nor clerk being present, was unauthorized and sale by substituted trustee was void. White v. Stennis, 151 Miss. 765, 118 So. 902 (1928).

Appointment of substituted trustee by writing addressed to chancery clerk of county, specifying substitution, held sufficient to vest substituted trustee with power to maintain suit in replevin for property covered by deed of trust. Stringer v. Price, 143 Miss. 189, 108 So. 431 (1926).

Recording appointment of substituted trustee in deed book instead of mortgage record held a compliance with statute.

Camp v. Celtic Land & Imp. Co., 129 Miss. 417, 91 So. 897 (1922).

Substitution of trustee appears of record and is spread thereon when written on margin by clerk and signed by beneficiary. King v. Jones, 121 Miss. 319, 83 So. 531 (1920).

Substitution of trustee may be by separate writing attached to original. Watkins v. McDonald, 41 So. 376 (Miss. 1906).

4. Effect of void sale.

Where a county, which had become the purchaser of land upon foreclosure of a deed of trust held by it, and had received a deed thereto from a subsequent trustee, but had obtained no title because the substitution of the trustee was not made a matter of record as required by statute, sold the land under an order of the board of supervisors, which was void in that the order had been made at a special meeting, the call for which failed to make provision, either expressly or impliedly, for taking up the matter of the sale and conveyance of the land, a later valid foreclosure of the trust deed and the purchase by the county did not inure to the benefit of the would-be purchaser under the void sale by the board, so as to render her title good, since such would-be purchaser had been affected with notice of the illegality of the first foreclosure and the conveyance following it made to her, and persons dealing with members of the board of supervisors, who are trustees for the public and bound by the limitations fixed by law on their powers, must take notice of their powers and cannot acquire rights where they are acting beyond their authority. Simpson County v. Floyd, 192 Miss. 501, 6 So. 2d 580 (1942).

5. Miscellaneous.

Substituted trustee could resell where first sale void because substitution not recorded. Polk v. S.S. Dale & Sons, 93 Miss. 664, 47 So. 386, 17 Am. Ann. Cas. 754 (1908).

Trustee appointed by mortgagee under provision providing for such appointment in default of payment to foreclose same, is not a substituted trustee. Searles v. Kelley, Simmons & Co., 88 Miss. 228, 40 So. 484 (1906).

Instrument by corporation substituting trustee not void because not under seal. Brown v. British Am. Mtg. Co., 86 Miss. 388, 38 So. 312 (1905).

§§ 89-5-47 through 89-5-53. Repealed.

Repealed by Laws, 1989, ch. 515, § 9, eff from and after January 1, 1990.

§ 89-5-47. [Codes, 1930, § 2171; 1942, § 893; Laws, 1924, ch. 226]

§ 89-5-49. [Codes, 1930, § 2172; 1942, § 894; Laws, 1924, ch. 226]

§ 89-5-51. [Codes, 1930, § 2173; 1942, § 895; Laws, 1924, ch. 226]

§ 89-5-53. [Codes, 1930, § 2174; 1942, § 896; Laws, 1924, ch. 226; Laws, 1978, ch. 529 § 1]

Editor's Note — Former § 89-5-47 specified the place for filing notice of a federal tax lien. For provisions governing filing of federal tax liens from and after January 1, 1990, see Uniform Federal Lien Registration Act, §§ 85-8-1 et seq.

Former § 89-5-49 required notice of a federal tax lien to be entered in a federal tax lien index. For provisions governing filing of federal tax liens from and after January 1, 1990, see Uniform Federal Lien Registration Act, §§ 85-8-1 et seq.

Former § 89-5-51 related to entering notice of discharge of a lien. For provisions governing filing of federal tax liens from and after January 1, 1990, see Uniform Federal Lien Registration Act, §§ 85-8-1 et seq.

Former § 89-5-53 provided for compensation of the chancery clerk for filing and indexing notice of lien, and each certificate of discharge. For provisions governing filing of federal tax liens from and after January 1, 1990, see Uniform Federal Lien Registration Act, §§ 85-8-1 et seq.

Article 3.

Uniform Real Property Electronic Recording Act.

Sec.

89-5-101. Short title.
89-5-103. Definitions.
89-5-105. Validity of electronic documents.
89-5-107. Recording of documents.
89-5-109. Administration and standards.
89-5-111. Uniformity of application and construction.
89-5-113. Relation to Electronic Signatures in Global and National Commerce Act.

§ 89-5-101. Short title.

This article may be cited as the Uniform Real Property Electronic Recording Act.

SOURCES: Laws, 2011, ch. 364, § 1, eff from and after July 1, 2011.

Comparable Laws from other States — Alabama: Code of Ala. §§ 35-4-120 et seq.
Arizona: A.R.S. §§ 11-487 et seq.
Arkansas: A.C.A. §§ 14-15-301 et seq.
Connecticut: Conn. Gen. Stat. §§ 7-35aa et seq.
Florida: Fla. Stat. § 695.27
Idaho: Idaho Code § 31-2901 et seq.
Hawaii: HRS § 502-121 et seq.
Illinois: 765 ILCS 33/1 et seq.
Kansas: K.S.A. § 58-4401 et seq.
Michigan: MCLS § 565.841 et seq.
Nevada: Nev. Rev. Stat. Ann. § 111.366 et seq.
New Mexico: N.M. Stat. Ann. § 14-9A-1 et seq.
North Carolina: N.C. Gen. Stat. § 47-16.1 et seq.
Oklahoma: 16 Okl. St. § 86.1 et seq.
South Carolina: S.C. Code Ann. § 30-6-10 et seq.
Tennessee: Tenn. Code Ann. §§ 66-24-201 et seq.
Texas: Tex. Prop. Code § 15.001 et seq.
Virginia: Va. Code Ann. §§ 55-142.10 et seq.
Washington: Rev. Code Wash. (ARCW) § 65.24.010 et seq.

§ 89-5-103. Definitions.

In this article:

(1) "Document" means information that is:

(a) Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(b) Eligible to be recorded in the land records maintained by the chancery clerk.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic document" means a document that is received by the chancery clerk in an electronic form.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

SOURCES: Laws, 2011, ch. 364, § 2, eff from and after July 1, 2011.

§ 89-5-105. Validity of electronic documents.

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

SOURCES: Laws, 2011, ch. 364, § 3, eff from and after July 1, 2011.

§ 89-5-107. Recording of documents.

(a) In this section, "paper document" means a document that is received by the chancery clerk in a form that is not electronic.

(b) A chancery clerk:

(1) Who implements any of the functions listed in this section shall do so in compliance with standards established by the commission.

(2) May receive, index, store, archive, and transmit electronic documents.

(3) May provide for access to, and for search and retrieval of, documents and information by electronic means.

(4) Who accepts electronic documents for recording shall continue to accept paper documents as authorized by state law and shall place entries for both types of documents in the same index.

(5) May convert paper documents accepted for recording into electronic form.

(6) May convert into electronic form information recorded before the chancery clerk began to record electronic documents.

(7) May accept electronically any fee or tax that the chancery clerk is authorized to collect.

(8) May agree with other officials of a state or a political subdivision thereof, or of the United States, on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees and taxes.

SOURCES: Laws, 2011, ch. 364, § 4, eff from and after July 1, 2011.

Cross References — Mississippi Electronic Recording Commission, see § 89-5-109.

§ 89-5-109. Administration and standards.

(a) The Mississippi Electronic Recording Commission consisting of eleven (11) members is created to adopt standards to implement this article. The membership of the commission shall comprise the following:

(1) A person appointed by the Governor;
(2) A person appointed by the Lieutenant Governor;
(3) A person appointed by the Speaker of the House of Representatives;
(4) Three (3) members of the Chancery Clerks' Association;
(5) A person appointed by the Mississippi Association of Supervisors;
(6) The director of the Mississippi Information Technology Services or his designee; and
(7) Three (3) persons appointed by the Secretary of State.

Appointed members of the commission shall serve a term of two (2) years from the date of appointment as evidenced by letters to the Secretary of the Senate and the Clerk of the House of Representatives, with the appointment letter last received being the effective date of appointment. Any member serving by virtue of appointment shall serve until a successor is duly appointed. Appointed members shall be eligible for reappointment at the end of their terms.

(b) Appointments are to be made no later than October 1, 2011, and the initial meeting of the commission is to be held no later than November 1, 2011. The initial meeting is to be called at a time and place designated by the Secretary of State who shall preside until a permanent chair is elected. The election of a permanent chair shall be held at the initial meeting. The chair shall serve during the chair's tenure but shall not serve consecutive terms as chair. The commission shall establish rules to govern the conduct of its meetings and shall elect such officers as provided in the rules. A quorum shall consist of no fewer than six (6) members.

(c) To keep the standards and practices of chancery clerks in this state in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this article and to keep the technology used by chancery clerks in this state compatible with technology used by recording offices in other jurisdictions that enact substantially this article, the commission, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing standards shall consider:

(1) Standards and practices of other jurisdictions;

(2) The most recent standards promulgated by national standard-setting bodies, such as the Property Records Industry Association;

(3) The views of interested persons and governmental officials and entities;

(4) The needs of counties of varying size, population, and resources; and

(5) Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

SOURCES: Laws, 2011, ch. 364, § 5, eff from and after July 1, 2011.

§ 89-5-111. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SOURCES: Laws, 2011, ch. 364, § 6, eff from and after July 1, 2011.

§ 89-5-113. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 USCS Section 7001, et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 USCS Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 USCS Section 7003(b)).

SOURCES: Laws, 2011, ch. 364, § 7, eff from and after July 1, 2011.

CHAPTER 6

Mississippi Plane Coordinate System

Sec.
89-6-1. Description of systems of plane coordinates.
89-6-3. Plane coordinate values.
89-6-5. Definitions applicable to Mississippi Coordinate System of 1927.
89-6-7. Definitions applicable to Mississippi Coordinate System of 1983.
89-6-9. Explanation of terms.
89-6-11. Recording coordinates; requirements for recognition.
89-6-13. Use of system of plane coordinates to describe location of point within state.
89-6-15. Effective date for usage of systems.
89-6-17. Conversion of distances or coordinates between English and metric unit.
89-6-19. Use of metes and bounds descriptions or lot and block descriptions.

§ 89-6-1. Description of systems of plane coordinates.

(1) The systems of plane coordinates established and maintained by the National Ocean Service/National Geodetic Survey (formerly the United States Coast and Geodetic Survey), or its successors, for defining and stating the geographic position or location of points on the surface of the earth within the State of Mississippi are hereafter to be known and designated as the Mississippi Coordinate System of 1927 (MCS'27) and the Mississippi Coordinate System of 1983 (MCS'83). These systems divide the area within the state into an "East Zone" and a "West Zone."

(2)(a) The area now included in the following eastern counties shall constitute the East Zone: Alcorn, Attala, Benton, Calhoun, Chickasaw, Choctaw, Clarke, Clay, Covington, Forrest, George, Greene, Hancock, Harrison, Itawamba, Jackson, Jasper, Jones, Kemper, Lafayette, Lamar, Lauderdale, Leake, Lee, Lowndes, Marshall, Monroe, Neshoba, Newton, Noxubee, Oktibbeha, Pearl River, Perry, Pontotoc, Prentiss, Scott, Smith, Stone, Tippah, Tishomingo, Union, Wayne, Webster and Winston.

(b) The area now included in the following western counties shall constitute the West Zone: Adams, Amite, Bolivar, Carroll, Claiborne, Coahoma, Copiah, DeSoto, Franklin, Grenada, Hinds, Holmes, Humphreys, Issaquena, Jefferson, Jefferson Davis, Lawrence, Leflore, Lincoln, Madison, Marion, Montgomery, Panola, Pike, Quitman, Rankin, Sharkey, Simpson, Sunflower, Tallahatchie, Tate, Tunica, Walthall, Warren, Washington, Wilkinson, Yalobusha and Yazoo.

(3) When any survey extends from one (1) into the other of the above coordinate zones, the position of all points involved may be referred to either of the two (2) zones.

SOURCES: Laws, 1991, ch. 462, § 1, eff from and after January 1, 1992.

§ 89-6-3. Plane coordinate values.

The plane coordinate values for a point on the earth's surface, used to express the geographic position or location of such point in the appropriate zone of the systems described in Section 89-6-1, shall consist of two (2) distances expressed in U.S. Survey Feet and decimals of a foot when using the Mississippi Coordinate System of 1927 and expressed in meters and decimals of a meter or U.S. Survey Feet and decimals of a foot when using the Mississippi Coordinate System of 1983. One (1) of these distances, to be known as the "Y" or "N-coordinate," shall give the position in a north and south direction; the other, to be known as the "X" or "E-coordinate," shall give the position in an east and west direction. These coordinates shall be made to depend upon and conform to the plane rectangular coordinate values for the monumented points of the National Geodetic Reference System as published by the National Ocean Service/National Geodetic Survey (formerly the United States Coast and Geodetic Survey), or its successors, and whose plane coordinates have been computed on the system defined in this chapter.

SOURCES: Laws, 1991, ch. 462, § 2; Laws, 2006, ch. 380, § 1, eff from and after passage (approved Mar. 13, 2006.)

Amendment Notes — The 2006 amendment inserted "or U.S. Survey Feet and decimals of a foot" following "and decimals of a meter" near the end of the first sentence.

§ 89-6-5. Definitions applicable to Mississippi Coordinate System of 1927.

For purposes of more precisely defining the Mississippi Coordinate System of 1927, the following definition by the United States Coast and Geodetic Survey (now the National Ocean Service/National Geodetic Survey) is adopted:

(a) The "Mississippi Coordinate System of 1927 East Zone" is a transverse Mercator projection of the Clarke spheroid of 1866, having a central meridian eighty-eight (88) degrees fifty (50) minutes west of Greenwich, on which meridian the scale is set at one (1) part in twenty-five thousand (25,000) too small. The origin of coordinates is at the intersection of the meridian eighty-eight (88) degrees fifty (50) minutes west of Greenwich and the parallel twenty-nine (29) degrees forty (40) minutes north latitude. This origin is given the coordinates: X 500,000 feet and Y 0 feet.

(b) The "Mississippi Coordinate System of 1927 West Zone" is a transverse Mercator projection of the Clarke spheroid of 1866, having a central meridian ninety (90) degrees twenty (20) minutes west of Greenwich, on which meridian the scale is set at one (1) part in seventeen thousand (17,000) too small. The origin of coordinates is at the intersection of the meridian ninety (90) degrees twenty (20) minutes west of Greenwich and the parallel thirty (30) degrees thirty (30) minutes north latitude. This origin is given the coordinates: X 500,000 feet and Y 0 feet.

SOURCES: Laws, 1991, ch. 462, § 3, eff from and after January 1, 1992.

§ 89-6-7. Definitions applicable to Mississippi Coordinate System of 1983.

For purposes of more precisely defining the Mississippi Coordinate System of 1983, the following definition by the National Ocean Service/National Geodetic Survey is adopted:

(a) The "Mississippi Coordinate System of 1983 East Zone" is a transverse Mercator projection of the North American Datum of 1983, having a central meridian of eighty-eight (88) degrees fifty (50) minutes west of Greenwich, on which meridian the scale is set at one (1) part in twenty thousand (20,000) too small. The origin of coordinates is at the intersection of the meridian eighty-eight (88) degrees fifty (50) minutes west of Greenwich and the parallel twenty-nine (29) degrees thirty (30) minutes north latitude. This origin is given the coordinates: N 0 meters and E 300,000 meters.

(b) The "Mississippi Coordinate System of 1983 West Zone" is a transverse Mercator projection of the North American Datum of 1983, having a central meridian ninety (90) degrees twenty (20) minutes west of Greenwich, on which meridian the scale is set at one (1) part in twenty thousand (20,000) too small. The origin of coordinates is at the intersection of the meridian ninety (90) degrees twenty (20) minutes west of Greenwich and the parallel twenty-nine (29) degrees thirty (30) minutes north latitude. This origin is given the coordinates: N 0 meters and E 700,000 meters.

SOURCES: Laws, 1991, ch. 462, § 4, eff from and after January 1, 1992.

§ 89-6-9. Explanation of terms.

The use of the term "Mississippi Coordinate System of 1927" (MCS'27) or "Mississippi Coordinate System of 1983" (MCS'83) on any map, report of survey, or other document shall be limited to coordinates based on the Mississippi coordinate systems as defined in this chapter.

SOURCES: Laws, 1991, ch. 462, § 5, eff from and after January 1, 1992.

§ 89-6-11. Recording coordinates; requirements for recognition.

No coordinates based on either Mississippi coordinate system, purporting to define the position of a point, shall be recorded on any plat or in any public record unless the coordinates are derived from an accurate connection to an identified existing or newly established permanently-monumented third order Class I(1:10,000) or higher order station of the National Geodetic Reference System. Standards and specifications of the Federal Geodetic Control Committee (FGCC) or its successor in force on the date of survey shall apply. Published existing control stations or the acceptance with intent to publish the newly established station by the National Ocean Service/National Geodetic Survey will constitute evidence of adherence to the FGCC specifications.

SOURCES: Laws, 1991, ch. 462, § 6, eff from and after January 1, 1992.

§ 89-6-13. Use of system of plane coordinates to describe location of point within state.

For purposes of describing the location of any point in the State of Mississippi, it shall be considered a complete, legal and satisfactory description of such location to give the position of such point on the system of plane coordinates defined in this chapter, provided the connection to the Mississippi Coordinate System is made in accordance with the provisions of this chapter and the standards of practice for surveying as adopted by the Board of Licensure for Professional Engineers and Surveyors. Whenever coordinates are affixed to any point which has previously been described by another system, the coordinates shall be construed as additional evidence of the location of the same point. In the event of any conflict as to the point or its location, the common rules of evidence shall be used to resolve the conflict. When used to reference the position of a point to be cited in recorded description of real property, the description must be written in a form that is tied to the existing land system.

SOURCES: Laws, 1991, ch. 462, § 7; Laws, 2006, ch. 380, § 2, eff from and after passage (approved Mar. 13, 2006.)

§ 89-6-15. Effective date for usage of systems.

The Mississippi Coordinate System of 1927 shall not be used after December 31, 1999; the Mississippi Coordinate System of 1983 shall be the sole system after such date.

SOURCES: Laws, 1991, ch. 462, § 8, eff from and after January 1, 1992.

§ 89-6-17. Conversion of distances or coordinates between English and metric unit.

Any conversion of distances or coordinates between the English and metric unit shall be made using the following conversion factor: one (1) meter equals 3.280833333 ⅓ U.S. Survey feet. A minimum of ten (10) significant figures shall be used when converting coordinates.

SOURCES: Laws, 1991, ch. 462, § 9, eff from and after January 1, 1992.

§ 89-6-19. Use of metes and bounds descriptions or lot and block descriptions.

No provision of this chapter shall prohibit or preclude the use of metes and bounds descriptions or lot and block descriptions.

SOURCES: Laws, 1991, ch. 462, § 10, eff from and after January 1, 1992.

CHAPTER 7

Landlord and Tenant

Sec.

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§ 89-7-1. Goods not to be removed until rent paid.

No goods or chattels, lying or being in or upon any messuage, lands or tenements, leased or rented for life, years, at will, or otherwise, shall at any time be liable to be taken by virtue of any writ of execution, or other process whatever, unless the party so taking the same shall, before the removal of the goods or chattels from such premises, pay or tender to the landlord or lessor thereof, all the unpaid rent for the said premises, whether the day of payment shall have come or not, provided it shall not amount to more than one (1) year's rent; and the party suing out such execution or other process, paying or tendering to such landlord or lessor the rent unpaid, not to exceed one (1) year's rent, may proceed to execute his judgment or process; and the officer levying the same shall be empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the money due under the process, and when the rent contracted for is payable, not in money, but in other things, the creditor shall pay the landlord the money value of such things.

SOURCES: Codes, 1906, § 2851; Hemingway's 1917, § 2349; 1930, § 2175; 1942, § 897; Laws, 1894, ch. 52.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Liens generally, see §§ 85-7-1 through 85-7-9.

Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

JUDICIAL DECISIONS

1. In general.

Landlord Lien Statute affords unpaid landlord no rights in property of third persons on landlord's premises. By analogy, landlord should not acquire lien under § 89-7-51(2) on property not belonging to lessee. Hicks v. Thomas, 516 So. 2d 1344 (Miss. 1987).

The lien for the enforcement of which the statute provides is that inherent in the relation of landlord and tenant and therefore is not one created by legal proceedings within the provisions of the Bankruptcy Act that liens obtained through legal proceedings against an insolvent within four months prior to the filing of the petition of bankruptcy shall be deemed void. Irby v. Corey, 95 F.2d 963 (5th Cir. 1938).

Seizure and removal of automobile trailers from leased premises under attachment writ by landlord for nonpayment of rent did not affect purchase money liens on trailers, since neither vendor nor purchaser thereof did anything in furtherance of the removal. Dorsey v. Latham, 194 Miss. 253, 11 So. 2d 897 (1943).

The provision that goods shall not be taken from rented premises under process until rent is paid does not give landlord lien on property on leased premises for rent. White v. Miazza-Woods Const. Co., 122 Miss. 213, 84 So. 181 (1920); Walker v. First Nat'l Bank, 168 Miss. 487, 151 So. 740 (1934).

Where estate was insolvent, rent due landlord for store occupied by decedent before death, while claim superior to that of general creditors, was not preferred over claims for expenses of last illness, funeral, and administration, where administrator sold goods in store building under court order. Walker v. First Nat'l Bank, 168 Miss. 487, 151 So. 740 (1934).

If clause in lease prohibiting removal of property while rent was unpaid created equitable lien, it was not enforceable by statutory remedy of distress for rent. Lake v. Morson, 164 Miss. 401, 145 So. 337 (1933).

Rent accrued prior to the filing of a petition in bankruptcy is, however, properly allowable as a secured claim against the proceeds of the trustee's sale of the tenant's goods found on the premises at the time of the bankruptcy. In re Wall, 60 F.2d 573 (S.D. Miss. 1932).

Under this provision a landlord has no lien for rent upon his tenant's goods until a distress warrant is levied thereon, but has a right only to exact payment of rent before they can be taken off the premises by legal process. American Stores Co. v. Gerlach, 55 F.2d 658 (3d Cir. Pa. 1932).

This provision does not make rent to accrue subsequent to bankruptcy a fixed liability absolutely owing at the time of the adjudication and as such provable against a bankrupt's estate. In re S. & H. Katz, 6 F.2d 581 (S.D. Miss. 1925).

In absence of seizure of tenant's goods by legal process, landlord has only inchoate right which may develop into a preference. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447 (1925).

Landlord has no lien for rent except on agricultural products. Engleburg v. Tonkel, 140 Miss. 513, 106 So. 447 (1925).

Claim of lessor of storehouse is preference claim against insolvent tenant, and lessor had right to payment out of proceeds of sale though she did not assert her claim within thirty days after removal of the goods pursuant to sale. Epstein v. Farr, 112 Miss. 530, 73 So. 572 (1917).

This section [Code 1942, § 897] does not subject property of third persons on leased premises to liability for rent. Brunswick-Balke-Collender Co. v. Murphy, 89 Miss. 264, 42 So. 288 (1906).

§ 89-7-3. Tenant not bound to pay rent for, or to restore, buildings destroyed; exception.

A tenant shall not be bound to pay rent for buildings after their destruction by fire or otherwise, nor shall a covenant or promise by a lessee to leave or restore the premises in good repair have the effect to bind him to erect or pay for such buildings as may be so destroyed, unless in respect to the matters aforesaid there was negligence or fault on his part, or unless he has expressly stipulated to be so bound.

SOURCES: Codes, 1880, §§ 1239, 1240; 1892, §§ 2497, 2498; 1906, §§ 2834, 2835; Hemingway's 1917, §§ 2332, 2333; 1930, § 2176; 1942, § 898.

Cross References — Limitation of mechanic's lien to building and estate of tenants, see § 85-7-137.

JUDICIAL DECISIONS

1. In general.

Where a building was destroyed by fire and the fire was not caused by negligence or fault of the lessee and the lessee did not expressly stipulate to pay for rent after destruction by the fire, the lessee was entitled to a reduction in the monthly rental to be paid for the leased premises and the lessee did not lose his right when he rebuilt the building at his own expense. Miller v. Miller, 222 Miss. 588, 76 So. 2d 705 (1955).

A tenant is not liable for accidental damages or destruction by fire, unless he has contracted to assume liability for such damages. Miller v. Miller, 217 Miss. 650, 64 So. 2d 739, 38 A.L.R.2d 674 (1953).

In an action brought by lessee against lessor of a gasoline station seeking reduction of monthly rental to be paid on account of destruction of the main service station building by fire, or, in the alternative, to require the lessors to restore the building to its former condition, wherein the lessors filed a cross bill to recover for damages to the building on the ground that the fire was the result of lessee's negligence, evidence sustained a finding that there was insufficient proof that fire was caused by the negligence of lessee or his employees. Miller v. Miller, 217 Miss. 650, 64 So. 2d 739, 38 A.L.R.2d 674 (1953).

In the absence of an agreement to the contrary, the tenant is not liable for damages to or the destruction of a building by fire unless there was negligence or fault on his part. Miller v. Miller, 217 Miss. 650, 64 So. 2d 739, 38 A.L.R.2d 674 (1953).

This section [Code 1942, § 898] affects contract rights of parties to a lease, but concluding clause is merely declaratory of common law right to sue tenant for negligent act, resulting in damage. Roell v. Brooks, 205 Miss. 255, 38 So. 2d 716 (1949).

In action under this section [Code 1942, § 898] by landlord against tenant for damages to leased premises by fire alleged to have been caused by negligence of defendant's manager in leaving gas heater burning during his absence from building, burden of proof is on plaintiff to show by preponderance of evidence that defendant did not use reasonable care in maintenance of reasonably safe gas heater and that such failure was proximate cause of fire and resulting damage. Roell v. Brooks, 205 Miss. 255, 38 So. 2d 716 (1949).

Tenant, although bound under lease to restore building destroyed by fire, held not entitled to proceeds of insurance taken out by the lessor. Panhandle Oil Co. v. Therrell, 158 Miss. 810, 131 So. 263 (1930).

Watertank, pump, and engine placed on leased premises by tenant after destruction by windstorm did not become fixtures. Frederick v. Smith, 147 Miss. 437, 111 So. 847 (1927).

If a lessee covenants "to take good care of the leased premises and to return the same in as good order as at the beginning of the lease, ordinary wear and tear, and damage by fire, wind and water excepted, and to make at his own expense all necessary repairs," he is obliged to make all such repairs as are necessary to keep the premises in such condition. The exceptions cannot be construed to relieve him of such obligations. Waddell v. De Jet, 76 Miss. 104, 23 So. 437 (1898).

An insolvent tenant who violates his obligation to repair, to the extent of endangering the destruction of the leased premises, subjects himself to a suit for the cancellation of his lease. Waddell v. De Jet, 76 Miss. 104, 23 So. 437 (1898).

No damages are allowable, but the tenant is entitled under the statute to an abatement of rent in the proportion that the value of the use of the ginhouse and machinery accidentally destroyed by fire during his term, bears to the value of the use of the whole premises. Taylor v. Hart, 73 Miss. 22, 18 So. 546 (1895).

RESEARCH REFERENCES

ALR. Liability of tenant for damage to the leased property due to his acts or neglect. 10 A.L.R.2d 1012.

Statute requiring property to be kept in good repair as affecting landlord's liability for personal injury to tenant or his privies. 17 A.L.R.2d 704.

Extent of lessee's obligation under express covenant as to repairs. 20 A.L.R.2d 1331.

Landlord's duty under express covenant to repair, rebuild, or restore, where property is damaged or destroyed by fire. 38 A.L.R.2d 682.

Condition of premises within contemplation of provision of lease or statute for cessation of rent or termination of lease in event of destruction of or damage to property as result of fire, calamity, the elements, act of God, or the like. 61 A.L.R.2d 1445.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises. 40 A.L.R.3d 646.

Landlord's failure to repair as aggravated negligence or similar fault. 40 A.L.R.3d 795.

Validity and construction of statute or ordinance authorizing withholding or payment into escrow of rent for period during which premises are not properly maintained by landlord. 40 A.L.R.3d 821.

Tenant's right, where landlord fails to make repairs, to have them made and set off cost against rent. 40 A.L.R.3d 1369.

Modern status of landlord's tort liability for injury or death of tenant or third person caused by dangerous condition of premises. 64 A.L.R.3d 339.

Landlord's liability for injury or death due to defects in areas of building (other than stairways) used in common by tenants. 65 A.L.R.3d 14.

Liability of landlord for personal injury or death due to inadequacy or lack of lighting on portion of premises used in common by tenants. 66 A.L.R.3d 202.

Landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants. 66 A.L.R.3d 374.

Landlord's liability for injury or death due to defects in exterior steps or stairs used in common by tenants. 67 A.L.R.3d 490.

Landlord's liability for injury or death caused by defective condition of interior steps or stairways used in common by tenants. 67 A.L.R.3d 587.

Modern status of rule as to tenant's rent liability after injury to or destruction of demised premises. 99 A.L.R.3d 738.

Commercial leases: application of rule that lease may be canceled only for "material" breach. 54 A.L.R.4th 595.

Implied warranty of fitness or suitability in commercial leases-modern status. 76 A.L.R.4th 928.

Measure and elements of damages for lessee's breach of covenant as to repairs. 45 A.L.R.5th 251.

Time within which tenant's right to remove trade fixtures must be exercised. 109 A.L.R.5th 421.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 678 et seq., 812 et seq.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 111 (instruction to jury on landlord's statutory duty to maintain leased premises in habitable condition).

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 296 (complaint by lessee of apartment unit; failure of landlord to maintain water and septic system).

17 Am. Jur. Pl & Pr Forms (Rev), Mobile Homes (complaint by lessee of lot in mobile home park for failure of landlord to maintain water and septic systems).

11A Am. Jur. Legal Forms 2d, Leases of Real Property §§ 161:266 et seq. (effect of injury to or destruction of premises on payment of rent).

11A Am. Jur. Legal Forms 2d, Leases of Real Property §§ 161:544 et seq. (rebuilding or restoration).

7 Am. Jur. Proof of Facts 3d 655, Material breach of Commercial Lease.

CJS. 51C C.J.S., Landlord and Tenant §§ 366(1) et seq.

§ 89-7-5. Action for use and occupation where there is no contract.

Where there is no contract, or where the agreement is not in writing, a landlord may maintain an action to recover a reasonable satisfaction for the use and occupation of the lands held and enjoyed by another. If on the trial of such action there appear in evidence any demise or agreement the plaintiff shall not on that account be nonsuited, but may make use thereof as evidence of the amount to be recovered.

SOURCES: Codes, 1857, ch. 41, art. 19; 1871, § 1638; 1880, § 1323; 1892, § 2538; 1906, § 2876; Hemingway's 1917, § 2374; 1930, § 2177; 1942, § 899.

Cross References — Requirement that leases for a term of more than one year be in writing, see § 15-3-1.

Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

Rental by husband of wife's property, see §§ 93-3-1, 93-3-7.

JUDICIAL DECISIONS

1. In general.

In an action by the lessor of commercial property to reject the lessee the lessor was entitled to recover $600 for the period of 30 days past the June 30, 1981 termination date of the lease, where a lease provision granting the lessee 30 days in which to remove the improvements placed on the lease premises was effective to extent the term of the lease for an additional 30 days; additionally, the lessor was entitled to recover a reasonable rental from August 1 to August 15, 1981, where August 15, 1981 was the date on which lessee vacated the premises, and where the lessor had sought reasonable rent after expiration of the lease. Terracina Motor Co. v. Sarullo, 419 So. 2d 1335 (Miss. 1982).

"Reasonable satisfaction" within the meaning of this section [Code 1942, § 879], is an issue of fact. Feltenstein v. Newell, 248 Miss. 880, 162 So. 2d 253 (1964).

Where a tenant removing from leased premises leaves thereon, and abandons to the seller property covered by a conditional sale agreement, the landlord may recover from the seller, in absence of agreement, only the reasonable cost of removing the property to dead storage, and the cost of such storage. Feltenstein v. Newell, 248 Miss. 880, 162 So. 2d 253 (1964).

A tenant upon shares is liable for damages as reasonable rental upon his failure to cultivate the land. Sledge v. Potts, 202 Miss. 480, 32 So. 2d 262 (1947).

Where under a written contract a tenant agreed to pay a percentage of certain crops as rent and reasonable rent for any and all other crops grown on the land, his abandonment of the land and failure to cultivate subjected him to a liability for reasonable value of the rental of the land notwithstanding uncertainty as to the amount of profits. Sledge v. Potts, 202 Miss. 480, 32 So. 2d 262 (1947).

Landowner is entitled to compensation for mooring of boats in front of his property for periods exceeding reasonable use for navigation; where boats are not moored constantly and permanently in front of property, owner is entitled to compensation only for time boats actually occupy banks beyond reasonable navigation uses; instruction authorizing landowner to recover for use and occupancy by mooring boats in front of bank for full period of limitation held error under evidence. Louisiana & Miss. R. Transf. Co. v. Long, 159 Miss. 654, 131 So. 84 (1930).

Under lease of land for its mill by lumber company containing option to renew, where it acquired timber lands about its mill sufficient to furnish material for several years beyond expiration of first lease, no specific notice to lessor of intention to renew required. Crenshaw-Gary Lumber Co. v. Norton, 111 Miss. 720, 72 So. 140 (1916).

Lessor's covenant to renew lease runs with land. Crenshaw-Gary Lumber Co. v. Norton, 111 Miss. 720, 72 So. 140 (1916).

Landlord entitled to reasonable rental after notice to vacate upon expiration of term, but not for time permitted tenant to remain in possession under circumstances indicating no rent charged. Thomas Hinds Lodge No. 58, F. & A.M. v. Presbyterian Church, 103 Miss. 130, 60 So. 66 (1912).

Where one pending negotiations, looking to an entire contract with the owner for the yearly lease of lands for several years, and a subsequent purchase, enters into possession, and the negotiations fail, he is not liable for the rent stipulated for in the negotiations, but for the reasonable rental value of the premises. Sutton v. Graham, 80 Miss. 636, 31 So. 909 (1902).

If a tenant from year to year, upon the death of a landlord, asserts title himself and refuses to surrender at the end of the year, or to longer pay rent, the heirs who recover in ejectment are entitled to charge him thereafter with the reasonable rental value, regardless of the former contract price. Thomas v. Thomas, 69 Miss. 564, 13 So. 666 (1891).

This statute gives the right in all cases where the possession is held in recognition of and not adversely to the title of the party suing. Newberg & Anderson v. Cowan, 62 Miss. 570 (1885).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 503, 504.

16 Am. Jur. Pl & Pr Forms (Rev) Landlord and Tenant, Forms 11, 12 (complaint, petition, or declaration to recover reasonable value of use and occupation).

CJS. 51C C.J.S., Landlord and Tenant §§ 552 et seq.

§ 89-7-7. Remedy by action for rent in arrear.

A person having rent in arrear or due upon any lease or demise of lands for life or lives, for years, at will, or otherwise, may bring an action for such arrears of rent against the person who ought to have paid the same or his legal representative.

SOURCES: Codes, 1857, ch. 41, art. 14; 1871, § 1633; 1880, § 1322; 1892, § 2537; 1906, § 2875; Hemingway's 1917, § 2373; 1930, § 2178; 1942, § 900.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

Right of landlord to remove tenant in manner prescribed by this Chapter for nonpayment of rent, not circumscribed by termination procedure specified in section 89-8-13, see § 89-8-13.

JUDICIAL DECISIONS

1. In general.

A sublessee incurs no liability to the lessor merely because of the subletting either for the payment of rent reserved in the original lease or for the performance of the other covenants on the part of the lessee, but the lessor and lessee may establish between themselves relationship of landlord and tenant by express agreement or by some affirmative action showing an election to treat a sublessee as the lessor's tenant. Goldberg v. L.H. Realty Corp., 227 Miss. 345, 86 So. 2d 326 (1956).

Where under a written contract a tenant agreed to pay a percentage of certain crops as rent and a reasonable rent for any and all other crops grown on the land, his abandonment of the land and failure to cultivate subjected him to liability for reasonable value of the rental of the land notwithstanding uncertainty as to the amount of profits. Sledge v. Potts, 202 Miss. 480, 32 So. 2d 262 (1947).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 502 et seq.

16 Am. Jur. Pl & Pr Forms (Rev) Landlord and Tenant, Form 1 (complaint, petition, or declaration to recover rent due under lease).

CJS. 51C C.J.S., Landlord and Tenant §§ 552 et seq.

§ 89-7-9. Death of tenant for life; apportionment of rent.

When a tenant for life who shall have demised lands, shall die on or after the day when any rent became payable, his executor or administrator may recover from the under-tenant the whole rent due; and if he die before the day when any rent is to become due, he may recover the proportion of the rent which accrued before the time of the death of the tenant. The tenant for the life of another, his executor or administrator, in case of the death of the person for whose life the estate is held, on or before the day when any rent shall become due shall have like remedy; and a like apportionment shall be made in the case of annuities.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (22); 1857, ch. 41, art. 20; 1871, § 1639; 1880, § 1328; 1892, § 2543; 1906, § 2881; Hemingway's 1917, § 2379; 1930, § 2179; 1942, § 901.

Cross References — Abatement of suit upon death of party, see §§ 91-7-237 et seq.

JUDICIAL DECISIONS

1. In general.

Amendment of statute, declaring rents arising from demise of land by life tenant apportionable, by adding words "and a like apportionment shall be made in the case of annuities" held not violative of constitutional guaranties of due process and equal protection of law in application to annuities arising under disability provisions of life policies as requiring apportionment notwithstanding express contract to contrary, where disability provisions contained no express stipulation that benefits should be apportionable. New York Life Ins. Co. v. Majet, 178 Miss. 440, 173 So. 412 (1937).

Amendment of statute, declaring rents arising from demise of land by life tenant apportionable, by adding words "and a like apportionment shall be made in the case of annuities," held to make all annuities apportionable, so as to entitle beneficiary under life insurance policy to payment of proportionate part of disability benefits provided for thereby in addition to face amount of policy on insured's death before anniversary date on which annual payment would have become due. New York Life Ins. Co. v. Majet, 173 Miss. 870, 161 So. 156, 101 A.L.R. 894 (1935).

RESEARCH REFERENCES

ALR. Life tenant's death as affecting rights under lease given by him. 14 A.L.R.4th 1054.

Death of lessee as terminating lease. 42 A.L.R.4th 963.

Am Jur. 51 Am. Jur. 2d, Life Tenants and Remaindermen §§ 151 et seq.

CJS. 31 C.J.S., Estates §§ 50-52.

§ 89-7-11. Rent assets in hands of personal representative.

If a person lease his land and die, the rent to accrue for the land during the year of his death shall be payable to the personal representative of the decedent, who shall have the same remedy therefor as the decedent would have had if he had lived.

SOURCES: Codes, 1880, § 1327; 1892, § 2542; 1906, § 2880; Hemingway's 1917, § 2378; 1930, § 2180; 1942, § 902.

Cross References — Liability of person in possession of escheated property for rent of real estate, see § 89-11-13.

Rental of land as asset of estate, see § 91-7-91.

JUDICIAL DECISIONS

1. In general.

Although the personal representative of a decedent has the power to collect rents under this section [Code 1942, § 902], such rents collected are the property of the respective devisees of the real estate upon which the rents accrue. Gaines v. Klein, 203 Miss. 271, 34 So. 2d 489 (1948).

The statute applies to cases of testacy as well as intestacy. Tucker v. Whitehead, 58 Miss. 762 (1881).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 502 et seq.

CJS. 51C C.J.S., Landlord and Tenant §§ 522 et seq.

§ 89-7-13. Executor or administrator may sue or distrain.

The executor or administrator of a person to whom rent is due and not paid at the time of his death may have an action for all such arrearages against the tenant or tenants who ought to have paid the rent so being behind in the lifetime of their testator or intestate, or against the executors or administrators of such tenants. Every executor or administrator of any person to whom such rent is due and not paid at the time of his death, may distrain for the arrearages of all such rents on the lands which were charged with the payment of such rents, and liable to the distress of the testator or intestate, so long as the same continue in the seizin or possession of the tenant who ought to have paid the rent to the testator or intestate in his lifetime, or in the seizin or possession of any person claiming the lands, only by and from the tenant, by purchase, gift, or descent, in like manner and form as the said executor's or administrator's testator or intestate might have done in his lifetime. The executors and administrators for the same distress may lawfully make avowry.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (20); 1857, ch. 41, art. 17; 1871, § 1636; 1880, § 1326; 1892, § 2541; 1906, § 2879; Hemingway's 1917, § 2377; 1930, § 2181; 1942, § 903.

Cross References — Powers of temporary administrator generally, see § 91-7-57. Leases of land by executor or administrator to pay debts of deceased, see § 91-7-225. Actions by executors or administrators, see §§ 91-7-231 et seq.

§ 89-7-15. Rights of assignees of lessor.

The grantees or assignees, and their heirs, personal representatives and assignees, of any lands let to lease, or of the reversion thereof, may have and enjoy the same advantages against the lessees, their personal representatives and assigns, by entry for the non-payment of rent, or for doing of waste or suffering any forfeiture, and may have and avail of all the covenants and agreements contained in the leases, demises or grants against the lessees, their personal representatives and assigns, which the lessors themselves or their heirs could have had or enjoyed.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (18); 1857, ch. 41, art. 15; 1871, § 1634; 1880, § 1324; 1892, § 2539; 1906, § 2877; Hemingway's 1917, § 2375; 1930, § 2182; 1942, § 904.

Cross References — Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

JUDICIAL DECISIONS

1. In general.

Lease of portion of building being assignable at common law, Code 1906, §§ 2877, 2878, 4001 do not affect question of whether lessor's mortgagee charged with notice of assignment of unrecorded lease. Corinth Bank & Trust Co. v. Wallace, 111 Miss. 62, 71 So. 266 (1916).

Code 1906, §§ 2877, 2878, merely enlarge and broaden rights of assignee of lease under certain circumstances. Corinth Bank & Trust Co. v. Wallace, 111 Miss. 62, 71 So. 266 (1916).

Where lessee sublet premises subject to original lease, sublessee entitled to benefits of original lease, and to damages consequent upon lessee releasing water rights thereunder. Hairston v. Montgomery, 102 Miss. 364, 59 So. 793 (1912).

Lessee cannot avoid lease because county and state in which land located not designated in body of lease, where same were designated in caption thereto and lease was acknowledged before officer and recorded in the county named. Gex v. Dill, 86 Miss. 10, 38 So. 193 (1905).

The right of a tenant to renew a lease is assignable, and it may be exercised at any time during the original term unless it be limited by the grant or terminated by the parties; A landlord may demand of a tenant during the term the exercise of a right to renew the lease and if not exercised on demand, it will be terminated. McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. R. 541 (1900).

The right of re-entry for nonpayment of rent is not an estate in land, but a mere right or chose in action, and the assignee under Code 1892, § 660 (Code 1906, § 717), may sue and recover in his own name. Wright v. Hardy, 76 Miss. 524, 24 So. 697 (1899).

The rights given to the assignee of a lessor by this section [Code 1942, § 904] apply only to estates for life or years, and not to estates in fee; lands let to lease are those conveyed only for life, years, or at will. Wright v. Hardy, 76 Miss. 524, 24 So. 697 (1899).

Where an owner rents his lands and takes rent notes, and afterwards makes an assignment, conveying his lands, tenements, and hereditaments, the right to the rents passes to the assignee by the use of the word "hereditaments." Allen v. Smith Bros. Co., 72 Miss. 689, 18 So. 579 (1895).

The purchaser of land at partition sale is entitled to the rent falling due after his purchase, if not expressly reserved, and may distrain therefor, notwithstanding a rent note previously given therefor had been assigned by the landlord to another, who contests the purchaser's right to such rent. Kessee v. Sloan, 69 Miss. 369, 11 So. 631 (1892).

Rent is an incident to the reversion, and before maturity follows the title to the premises, except as otherwise provided by statute. Bloodworth v. Stevens, 51 Miss. 475 (1875).

RESEARCH REFERENCES

ALR. Measure and elements of damages for lessee's breach of covenant as to repairs. 45 A.L.R.5th 251.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 420 et seq.

2B Am. Jur. Legal Forms 2d, Assignments § 25:165 (assignment-lease-acceptance and assumption of lessee's lease obligations-with consent of lessor).

CJS. 51C C.J.S., Landlord and Tenant §§ 258, 259.

§ 89-7-17. Grants of rents, good without attornment.

Grants of rents or reversions or remainders shall be good and effectual without attornment of the tenants; but a tenant who has paid the rent to the grantor before notice of the grant shall not suffer any damage thereby.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (30); 1857, ch. 36, art. 5; 1871, § 2288; 1880, § 1191; 1892, § 2499; 1906, § 2836; Hemingway's 1917, § 2334; 1930, § 2183; 1942, § 905.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 421.

11B Am. Jur. Legal Forms 2d, Leases of Real Property § 161:705 (lessor's right to assign rents).

CJS. 51C C.J.S., Landlord and Tenant § 259.

§ 89-7-19. Attornment of tenant to stranger void; exception.

The attornment of a tenant to a stranger shall be void unless it be with the consent of the landlord of such tenant, or pursuant to or in consequence of the judgment of a court of law or the decree of a court of equity.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 1 (31); 1857, ch. 36, art. 6; 1871, § 2289; 1880, § 1192; 1892, § 2500; 1906, § 2837; Hemingway's 1917, § 2335; 1930, § 2184; 1942, § 906.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 104.

CJS. 51C C.J.S., Landlord and Tenant §§ 277-279.

§ 89-7-21. Rights of lessees against assignees of lessor.

All lessees of lands for a term of years, life or lives, their executors, administrators, or assigns, may have like action and advantage against all and every person or persons, their heirs and assigns, which have any gift or grant of the reversion of said lands, so leased, or any parcel thereof, for any condition, covenant, or agreement in their lease or leases, as the lessees, or any of them, might have had against the lessors and their heirs, only excepting the benefit and advantage of recoveries in value, by reason of any warranty in deed or law.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (19); 1857, ch. 41, art. 16; 1871, § 1635; 1880, § 1325; 1892, § 2540; 1906, § 2878; Hemingway's 1917, § 2376; 1930, § 2185; 1942, § 907.

Cross References — Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

RESEARCH REFERENCES

ALR. Covenant of lessee to insure as running with the land. 18 A.L.R.2d 1051.

Rights and remedies of tenant upon landlord's breach of covenant to repair. 28 A.L.R.2d 446.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 93 et seq.

§ 89-7-23. Notice to terminate tenancy.

Notice to quit shall be necessary only where the term is not to expire at a fixed time. In all cases in which a notice is required to be given by the landlord or tenant to determine a tenancy, two (2) months' notice, in writing, shall be given where the holding is from year to year, and one (1) month's notice shall be given where the holding is by the half-year or quarter-year; and where the letting is by the month or by the week, one (1) week's notice, in writing, shall be given. This section shall not apply to rental agreements governed by the Residential Landlord and Tenant Act.

SOURCES: Codes, 1857, ch. 41, art. 21; 1871, § 1640; 1880, § 1330; 1892, § 2544; 1906, § 2882; Hemingway's 1917, § 2380; 1930, § 2224; 1942, § 946; Laws, 1991, ch. 478, § 15, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross References — Residential Landlord and Tenant Act, see § 89-8-1, et seq.

Right of landlord to remove tenant in manner prescribed by this chapter for nonpayment of rent, not circumscribed by termination procedure specified in section 89-8-13, see § 89-8-13.

Amount of notice required to terminate tenancy governed by the Residential Landlord and Tenant Act, see § 89-8-19.

JUDICIAL DECISIONS

1. In general.
2. Tenant holding over.
3. Indefinite tenancies.

1. In general.

It is only where the rental term is not to expire at a fixed time that notice to quit becomes necessary. Price v. Moss, 214 Miss. 253, 58 So. 2d 661 (1952).

In an unlawful entry and detainer action by one claiming title through a tax purchaser, preliminary notice to vacate the premises need not be given to tenants of one who was the owner prior to tax sale. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746 (1947).

A notice to vacate for various reasons given pursuant to permission of the area rent control office to proceed with legal eviction on the ground of nuisance did not place the eviction proceedings on the same basis as expiration of a month to month tenancy after due notice to vacate. Young v. Weaver, 202 Miss. 291, 32 So. 2d 202, 174 A.L.R. 983 (1947).

Where tenancy, which had been held under definite, different contracts for 1933 and 1934, terminated on December 31, 1934, and proceeding was brought in January, 1935, after notice on January 9, 1935, to vacate, landlord's failure to give such notice before expiration of lease did not amount to waiver of right to possession; statute requiring two months' notice being inapplicable. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

Landowner, demanding and receiving payment of annual rent from one entering on land, elected to constitute and acknowledge latter as tenant, thereby impliedly creating tenancy by year. Hamilton v. Federal Land Bank, 175 Miss. 462, 167 So. 642 (1936).

Tenancy may be terminated by agreement without statutory written notice. Stacks v. Robson, 139 Miss. 600, 104 So. 354 (1925).

Tenant from year to year notified that rent would be increased but not assenting thereto, did not by remaining on the land become liable for increase as she had right to hold until tenancy terminated in statutory manner. Bancroft v. Seashore Camp Ground Sch., 120 Miss. 446, 82 So. 314 (1919).

Tenant from year to year entitled to two months' notice in writing of termination. Scruggs v. McGehee, 110 Miss. 10, 69 So. 1003 (1915).

A mere licensee is not entitled to notice to quit. Johns v. McDaniel, 60 Miss. 486 (1882).

2. Tenant holding over.

Where a tenancy was from month to month, beginning on the 10th of the month, the landlord, who gave the tenant written notice on April 5th to vacate on the 30th of that month, should not be denied double rent for the period the tenant held over after the 10th of May, on the ground that the notice fixed a time for vacation ten days earlier than he was entitled to fix, since the tenant could not have been misled by the notice, but knew that the landlord intended him to vacate not on the 30th of the month, but on the 10th of the next month, and that he had simply made a mistake in fixing the date. Gulley v. Mayo, 191 Miss. 143, 1 So. 2d 800 (1941).

Tenant under implied tenancy from year to year had right to presume that such relation would continue for years into which he held over, in absence of statutory notice to contrary. Hamilton v. Federal Land Bank, 175 Miss. 462, 167 So. 642 (1936).

Lessee who failed to renew lease before expiration of existing term held not entitled to notice to vacate. Copiah Hdwe. Co. v. Johnson, 135 Miss. 358, 100 So. 31 (1924).

3. Indefinite tenancies.

Chancellor is in error in awarding increased rent to purchaser of property from date of decree awarding possession of property and rent due, but is correct in awarding to purchaser of property rent at agreed rate where tenant from month to month refused to pay increase in rent but remained on land and there was no statutory notice terminating tenancy. Williams v. Barlow, 205 Miss. 449, 38 So. 2d 914 (1949).

Tenant by month for indefinite period of time who is notified by landlord of increase in rent does not, by merely remaining on land, become liable for increase, but is liable only for rent agreed upon until tenancy is terminated by landlord in statutory manner. Williams v. Barlow, 205 Miss. 449, 38 So. 2d 914 (1949).

Chancellor is in error in terminating tenancy by month for indefinite period of time, against will of tenant, and in awarding possession of premises to landlord, on record showing that no written notice was given to tenant to terminate his tenancy, as provided by this section [Code 1942, § 946]. Williams v. Barlow, 205 Miss. 449, 38 So. 2d 914 (1949).

Under this section [Code 1942, § 946], letting of real property by month for indefinite period of time can only be terminated against will of tenant at end of monthly term then pending by giving one week's notice in writing. Williams v. Barlow, 205 Miss. 449, 38 So. 2d 914 (1949).

Where relation of landlord and tenant exists and there is holding from year to year with no definite period for termination of lease, notice to terminate tenancy is essential to maintenance of suit against tenant for possession. Hamilton v. Federal Land Bank, 175 Miss. 462, 167 So. 642 (1936).

Indefinite rental of building held tenancy from month to month, and tenant entitled to notice of termination. Lay v. Great S. Lumber Co., 118 Miss. 636, 79 So. 822 (1918).

A letting of real property by the month to continue for an indefinite period according to the wishes of the contracting parties, can only be terminated at the end of the monthly term then pending on giving one week's notice in writing. Wilson v. Wood, 84 Miss. 728, 36 So. 609 (1904).

Where land is leased by the month to continue for an indefinite period the tenancy can only be terminated at the end of a monthly term upon a week's notice in writing. Wilson v. Wood, 84 Miss. 728, 36 So. 609 (1904).

RESEARCH REFERENCES

ALR. Retaliatory eviction of tenant for reporting landlord's violation of law. 40 A.L.R.3d 753.

Lease provisions allowing termination or forfeiture for violation of law. 92 A.L.R.3d 967.

Circumstances excusing lessee's failure to give timely notice of exercise of option to renew or extend lease. 27 A.L.R.4th 266.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease. 29 A.L.R.4th 903.

What constitutes timely notice of exercise of option to renew or extend lease. 29 A.L.R.4th 956.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent-modern cases. 31 A.L.R.4th 1254.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease. 34 A.L.R.4th 857.

Specificity of description of premises as affecting enforceability of lease. 73 A.L.R.4th 236.

What constitutes abandonment of residential or commercial lease-modern cases. 84 A.L.R.4th 183.

Am Jur. 11B Am. Jur. Legal Forms 2d, Leases of Real Property §§ 161:1270 et seq. (notice of termination and cancellation).

15 Am. Jur. Proof of Facts 2d 209, Landlord's Reasonable Efforts to Minimize Damages After Tenant's Breach of Lease.

25 Am. Jur. Proof of Facts 2d 51, Abandonment of Lease of Real Property.

50 Am. Jur. Proof of Facts 2d 519, Lessee's Excusable Failure to give Timely Notice Exercising Option to Renew Lease.

CJS. 51C C.J.S., Landlord and Tenant §§ 81(1) et seq., 142(1) et seq., 150(1) et seq., 173, 183.

§ 89-7-25. Tenant holding after notice liable for double rent.

When a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he shall, in either case, thenceforward pay to the landlord double the rent which he should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession.

SOURCES: Codes, 1857, ch. 41, art. 23; 1871, § 1642; 1880, § 1331; 1892, § 2545; 1906, § 2883; Hemingway's 1917, § 2381; 1930, § 2225; 1942, § 947.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.
2. Penal nature of statute.
3. Notice.
4. Recovery of double rent.
5. Attorney's fees.
6. Waiver and estoppel.

1. In general.

The statute is the sole remedy for landlords against holdover tenants; the common law rule with regard to holdover tenants was abrogated by the statute. Dungan v. Presley, 765 So. 2d 592 (Miss. Ct. App. 2000).

Where the landlord did not covenant to put the new tenant in possession of the leased premises, the landlord's right to bring a dispossessory action against the old tenant was transferred to the new tenant, and the new tenant was bound by the terms of this section and could recover no more than the damages allowed the landlord under this section. Southwest Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc., 320 So. 2d 776 (Miss. 1975).

Judgment may be entered for both single and double rent in an unlawful entry and detainer proceeding. Firestone Tire & Rubber Co. v. Fried, 202 Miss. 370, 31 So. 2d 116 (1947), error overruled, 202 Miss. 385, 32 So. 2d 454 (1947).

Single rent only was recovered by a landlord during the time reasonably necessary for the tenant to remove its improvements after receiving notice the day before the lease expired that the landlord was exercising his retake privilege. Hines Motor Co. v. Hederman, 201 Miss. 859, 30 So. 2d 70 (1947).

Under this section [Code 1942, § 947], rent due by a tenant unlawfully holding over after notice to vacate the premises is double that which he had agreed to pay. Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1946).

Tenant, who became trespasser by holding over beyond expiration of term, is liable for double rent thereafter, but only for that period dating from one year prior to suit. Sherrill v. Stewart, 199 Miss. 216, 23 So. 2d 915 (1945).

When a person is rightfully in possession of a leased premises and the landlord seeks wrongfully to evict him, the case does not become moot upon the mere fact that the tenant's term has expired before the time of trial, because, in such case, the general judgment in favor of the landlord would be to adjudge that the tenant was wrongfully in possession at the time the action was filed and before his rightful term expired, and might subject him to double rent under this section [Code 1942, § 947]. Henley v. Kilbas, 188 Miss. 604, 195 So. 582 (1940).

Liability of tenant holding over after notice to quit, for double rent, is absolute. Weatherall v. Brown, 113 Miss. 887, 74 So. 765 (1917).

After termination of lease tenant has reasonable time in which to remove effects, and on failure to do so landlord may remove them but does not acquire title by tenant's failure to remove. Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77 (1911).

2. Penal nature of statute.

In unlawful entry and detainer action against tenant holding over, imposition of damages at double rent cannot be awarded on testimony which is too vague to establish a rental basis, especially in view of penal nature of such award. Burr v. Johnson, 204 Miss. 479, 37 So. 2d 747 (1948), error overruled, 204 Miss. 486, 38 So. 2d 314 (1949).

One who is no longer within the orbit of federal statute because no longer a tenant, the office of price administration having authorized action for eviction or removal in accordance with requirements of local law, cannot avoid penalty provided by this section [Code 1942, § 947]. Stovall v. Gardner, 203 Miss. 527, 36 So. 2d 163 (1948).

"Double rent" imposed under this section [Code 1942, § 947] is a penalty and not rent in the accepted sense of being a stipulated consideration for the use or occupancy of property. Stovall v. Gardner, 203 Miss. 527, 36 So. 2d 163 (1948).

This section [Code 1942, § 947] is penal and should be strictly construed against the claim for double rent. Sherrill v. Stewart, 197 Miss. 880, 21 So. 2d 11 (1945), error overruled, 197 Miss. 900, 21 So. 2d 477 (1945).

Claim for double rent is one for a penalty and is subject to the one-year limitation period under Code 1942, § 731. Sherrill v. Stewart, 197 Miss. 880, 21 So. 2d 11 (1945), error overruled, 197 Miss. 900, 21 So. 2d 477 (1945).

The statutory provision making a tenant liable for double rent in case he holds over after notice is penal and should be strictly construed against the claim for double rent, but that does not mean that the very letter of the statute must be followed. Gulley v. Mayo, 191 Miss. 143, 1 So. 2d 800 (1941).

3. Notice.

Liability of tenant holding over after notice to quit for double rent is absolute. Stovall v. Gardner, 203 Miss. 527, 36 So. 2d 163 (1948).

There can be no double rent in the absence of a notice to quit; summons to the action is not equivalent to such notice. McKay v. Shaffer, 202 Miss. 558, 32 So. 2d 746 (1947).

Where a tenancy was from month to month, beginning on the 10th of the month, the landlord, who gave the tenant written notice on April 5th to vacate on the 30th of that month, should not be denied double rent for the period the tenant held over after the 10th of May, on the ground that the notice fixed a time for vacation ten days earlier than he was entitled to fix, since the tenant could not have been misled by the notice, but knew that the landlord intended him to vacate not on the 30th of the month, but on the 10th of the next month, and that he had simply made a mistake in fixing the date. Gulley v. Mayo, 191 Miss. 143, 1 So. 2d 800 (1941).

Subtenants, who held over under oral lease with tenant after termination of tenant's lease, were not liable to landlord for double rent, where landlord did not give such tenants notice to quit. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

Landlord's notice to quit enures to purchaser's benefit, and tenant becomes liable for double rent on remaining beyond his rights. Pinnix v. Jones, 127 Miss. 764, 90 So. 481 (1922).

Correspondence held to constitute notice to vacate, and plaintiff entitled to recover double rent. Stollenwerck v. Eure, 119 Miss. 854, 81 So. 594 (1919), error overruled, 120 Miss. 233, 82 So. 68 (1919).

4. Recovery of double rent.

Hold-over tenant was liable for double rent for entire premises that he had leased with cotenant, even though he claimed that he occupied only half of the premises. Murphree v. Aberdeen-Monroe County Hosp., 671 So. 2d 1300 (Miss. 1996).

On affirmance of judgment for landlord for possession of property, double rent and costs, judgment will be entered in supreme court against tenants and their sureties on supersedeas bond for double rent, plus interest thereon at rate of 6% per annum from date of judgment below to date of judgment in supreme court, and all costs, and for five per centum upon value of property interest in dispute, or amount of judgment, whichever shall be found to be smaller, which fact will be found by lower court on remand to it for that purpose, facts as to value not appearing in record. Conn v. Brashears, 38 So. 2d 907 (Miss. 1949).

This section [Code 1942, § 947] allowing double rent and Code 1942, § 1054, providing that judge shall find upon evidence the arrears of rent or reasonable compensation are applicable to suits in unlawful entry and detainer. Burr v. Johnson, 204 Miss. 479, 37 So. 2d 747 (1948), error overruled, 204 Miss. 486, 38 So. 2d 314 (1949).

Under this section [Code 1942, § 947], double rent may be recovered in an action of unlawful entry and detainer. Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1946).

The statutory remedy of recovery of double rent for tenant's holding over is exclusive, and hence recovery thereunder in dispossessory proceedings was res judicata of landlord's action for damages, notwithstanding another statute permitting recovery of both penalty and actual damages in certain cases. Tepper Bros. v. Buttross, 178 Miss. 659, 174 So. 556 (1937).

Double rent is recoverable in unlawful entry and detainer proceeding. Weatherall v. Brown, 113 Miss. 887, 74 So. 765 (1917).

5. Attorney's fees.

Attorney's fees are not recoverable under this statute, damages being expressly limited thereby to double rent, contractual provision to the contrary notwithstanding. Hines Motor Co. v. Hederman, 201 Miss. 859, 30 So. 2d 70 (1947).

6. Waiver and estoppel.

A landlord's sole action for damages as a result of a tenant's holdover is provided in § 89-7-25; accordingly, where the landlord notified the tenant of the approaching expiration of his annual lease and demanded that the premises be surrendered at the completion of the term, but never elected to pursue his statutory remedy by having the tenant evicted, the landlord's acceptance of one month's rent following the expiration of the lease created a month to month tenancy, and the landlord was entitled to nothing further when the tenant vacated the premises at the end of that month. Mississippi State Dep't of Pub. Welfare v. Howie, 449 So. 2d 772 (Miss. 1984).

Double rent was not recoverable prior to date on which tenant herself asserted that the term had expired, where landlord had waived the claim for double rent. Sherrill v. Stewart, 199 Miss. 216, 23 So. 2d 915 (1945).

Tenant's plea of estoppel in landlord's action for double rent, upon ground that landlord's position in present suit was inconsistent with prior suit between the same parties and relating to the same subject matter instituted by the landlord for dispossession wherein landlord waived claim for double rent, was not frivolous, so that the sustaining of plaintiff's motion to strike the plea constituted reversible error. Sherrill v. Stewart, 197 Miss. 880, 21 So. 2d 11 (1945), error overruled, 197 Miss. 900, 21 So. 2d 477 (1945).

RESEARCH REFERENCES

ALR. What constitutes tenant's holding over of leased premises. 13 A.L.R.5th 169.

Validity and construction of lease provision requiring lessee to pay liquidated sum for failure to vacate premises or surrender possession at expiration of lease. 23 A.L.R.2d 1318.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession. 7 A.L.R.4th 589.

What are reports prepared or used by "agency responsible for the regulation or supervision of financial institutions," within Freedom of Information Act (5 USCS § 552(b)(8)). 48 A.L.R. Fed. 814.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 960.

50 Am. Jur. Proof of Facts 2d 519, Lessee's Excusable Failure to give Timely Notice Exercising Option to Renew Lease.

Young, Trial Handbook for Mississippi Lawyers § 32:19.

CJS. 51C C.J.S., Landlord and Tenant §§ 73 et seq., 136(1) et seq., 148, 165, 177.

Law Reviews. Walker, Common Law Protection of Economic Expectancies: "Business Torts" in Mississippi. 50 Miss. L. J. 335, March 1979.

1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 89-7-27. Proceedings against tenant holding over.

A tenant or lessee at will or at sufferance, or for part of a year, or for one (1) or more years, of any houses, lands, or tenements, and the assigns, under-tenants, or legal representatives of such tenant or lessee, may be removed from the premises by the judge of the county court, any justice of the peace of the county, or by the mayor or police justice of any city, town, or village where the premises, or some part thereof, are situated, in the following cases, to wit:

First. — Where such tenant shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord.

Second. — After any default in the payment of the rent pursuant to the agreement under which such premises are held, and when satisfaction of the rent cannot be obtained by distress of goods, and three (3) days' notice, in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to the rent on the person owing the same.

SOURCES: Codes, 1857, ch. 41, art. 27; 1871, § 1646; 1880, § 1333; 1892, § 2547; 1906, § 2885; Hemingway's 1917, § 2383; 1930, § 2226; 1942, § 948.

Editor's Note — Pursuant to Miss. Const. Art. 6, Section 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

Cross References — Jurisdiction of county courts, see § 9-9-1.

Civil jurisdiction of justices of the peace, see § 9-11-9.

Unlawful entry and detainer by tenant, see §§ 11-25-1 et seq.

Duties of mayor generally, see § 21-3-15.

Powers and duties of police justice, see §§ 21-23-1 et seq.

Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Right of landlord to remove tenant in manner prescribed by this Chapter for nonpayment of rent, not circumscribed by termination procedure specified in section 89-8-13, see § 89-8-13.

Annulment of lease for unlawful use of premises, see § 95-3-23.

JUDICIAL DECISIONS

1. Jurisdiction.
2. Notice.
3. Procedure, generally.
4. Pleading.
5. Evidence.
6. Damages.
7. Appeals.
8. Estoppel and waiver.
9. Miscellaneous.

1. Jurisdiction.

Neither justice of peace, nor circuit court on appeal, in proceeding under this section [Code 1942, § 948], have any jurisdiction to make final and conclusive adjudication of title to property involved. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Circuit court has jurisdiction of both subject matter and parties on appeal with supersedeas from fault judgment by justice of peace, in summary proceeding under this section [Code 1942, § 948], to obtain possession of real property, rendered on invalid service of process, although justice of peace had jurisdiction only of subject matter when default judgment was rendered. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Supreme court has no jurisdiction to make conclusive adjudication of title to property on appeal of proceeding under this section [Code 1942, § 948] begun in justice of peace court, where neither justice of peace nor circuit court on appeal had jurisdiction to make final and conclusive adjudication of title to property as between parties to this litigation. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

County judge had jurisdiction of landlord's action to oust tenant at end of term, under statute, as against contention that county court has no authority to try causes in vacation. McMillan v. Best, 171 Miss. 811, 158 So. 488 (1935).

2. Notice.

A notice to tenant to vacate the premises was not in compliance with the statute since it failed to require in the alternative the payment of rent or the possession of the premises. Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).

Where tenancy, which had been held under definite, different contracts for 1933 and 1934, terminated on December 31, 1934, and proceeding was brought in January, 1935, after notice on January 9, 1935, to vacate, landlord's failure to give such notice before expiration of lease did not amount to waiver of right to possession; statute requiring two months' notice being inapplicable. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

3. Procedure, generally.

Judgment of county judge in ouster proceeding after termination of lease was not void on ground that county clerk filed all papers in proceeding and issued process, where defendants waived service of process and appeared before county judge by their answer and case was tried by agreement of all parties thereto. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

Error to grant peremptory instruction when evidence sharply conflicting as to existence of relation. Lockett v. Lockett, 95 So. 741 (Miss. 1923).

Consolidation of proceedings by vendor and purchaser to eject tenant held error, but not to require reversal, though costs would be charged against landlord. Pinnix v. Jones, 127 Miss. 764, 90 So. 481 (1922).

4. Pleading.

In an action by a landlord to recover possession of a house and lot against her tenant, the court found it unnecessary to review the ruling upon pleas in demurrer by the parties where the case was finally submitted to the jury on evidence which would have been permissible if the pleading had been confined to the two affidavits contemplated by this section [Code 1942, § 948], and Code 1942, § 953. Tanner v. Walsh, 184 Miss. 147, 183 So. 278 (1938).

5. Evidence.

In proceeding under this section [Code 1942, § 948], title to property cannot be conclusively adjudicated but landlord must make at least prima facie showing that he is entitled to possession. McCoy v.

McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

6. Damages.

Under Code 1942, § 947, double rent may be recovered in an action of unlawful entry and detainer inasmuch as Code 1942, §§ 1043 and 1054 provide for the recovery in such an action of "any amount for arrears of rent," and recovery therefor is not limited to the summary action provided by this section [Code 1942, § 948]. Ellison v. Landry, 199 Miss. 161, 24 So. 2d 319 (1946).

Plaintiff's cause of action on defendant's appeal bond stipulating that should judgment, awarding plaintiff possession of land under this section [Code 1942, § 948] as against defendant's contention that he was in possession under contract for purchase, be affirmed, defendant would pay all costs and the value of use and occupation of the land after time of taking the appeal, as well as damages for waste or injury, is enforceable, upon affirmance of the judgment, only by an original action on the bond, and not by merely remanding the cause to the court below for the ascertainment of the amount of damages covered by the bond. Hodges v. Jones, 197 Miss. 107, 19 So. 2d 518 (1944), motion granted in part, 197 Miss. 107, 19 So. 2d 917 (1944).

Interest of plaintiff in the land, where supreme court affirmed judgment granting plaintiff possession as against defendant's contention that he was in possession under contract for its purchase, was not limited to the rent due but covered all its value, so as to entitle plaintiff to 5 per cent damages on such value under Code 1942, § 1971. Hodges v. Jones, 197 Miss. 107, 19 So. 2d 518 (1944), motion granted in part, 197 Miss. 107, 19 So. 2d 917 (1944).

Where defendant's appeal bond stipulated that if judgment awarding owner possession of land was affirmed he would pay all costs and the value of the use and occupation of the land after the time of taking the appeal, but the question as to the amount of damages covered by the bond had not been argued by either counsel, no judgment would be rendered for damages upon affirmance, although appellee could file a motion for such a judgment, to which appellant could reply and appellee could make rejoinder. Hodges v. Jones, 197 Miss. 107, 19 So. 2d 518 (1944), motion granted in part, 197 Miss. 107, 19 So. 2d 917 (1944).

Proper elements of damages for wrongful suing out injunction to prevent tenants from removing building are attorney's fees, costs, depreciation, expenses of trial, and reasonable rent. Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926).

7. Appeals.

Statutes relating to bond and judgment thereon in proceedings to stay execution of writ of possession in ejectment (Code 1942, §§ 1165 and 1166) have no application to an appeal by tenant from judgment rendered against him in proceeding under this section [Code 1972, § 948] awarding appellee recovery of land as against contention that tenant was in possession under contract for purchase, since this is not an appeal from a judgment in an action of ejectment with a stay of execution. Hodges v. Jones, 197 Miss. 107, 19 So. 2d 518 (1944), motion granted in part, 197 Miss. 107, 19 So. 2d 917 (1944).

Appeal from judgment of justice of peace dispossessing tenant must be taken within five days after judgment. Simpson v. Boykin, 118 Miss. 701, 79 So. 852 (1918).

On appeal to the circuit court the tenant may for the first time make and file an affidavit denying the facts averred by the landlord, upon which the summons was issued, and will be entitled to a trial on the merits of the issue so made. Harvey v. Clark, 81 Miss. 166, 32 So. 906 (1902).

8. Estoppel and waiver.

Where a notice to vacate the premises was defective, but the tenant promised that he would move there was a waiver of written notice. Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).

Rule that person who enters into possession of property under agreement with another, either express or implied, to occupy it as tenant is ordinarily estopped to deny title of landlord is applicable only where relationship of landlord and tenant is admitted or established and does not preclude alleged tenant from showing that relationship never existed. McCoy v.

McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Where tenancy, which had been held under definite, different contracts for 1933 and 1934, terminated on December 31, 1934, and proceeding was brought in January, 1935, after notice on January 9, 1935, to vacate, landlord's failure to give such notice before expiration of lease did not amount to waiver of right to possession; statute requiring two months' notice being inapplicable. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

9. Miscellaneous.

Question of usury in note secured by deed of trust later foreclosed and effect of usury upon foreclosure sale will not be adjudicated in proceeding under this section [Code 1942, § 948] by purchaser of property at foreclosure sale to obtain possession of the property. McCoy v. McRae, 204 Miss. 309, 37 So. 2d 353 (1948).

Defendant in possession of land under a parol agreement with owner's husband, approved by owner, to convey it to defendant upon payment of stipulated price, a portion of which had been paid, was merely a tenant at will or sufferance, thereby entitling owner, who had given notice to vacate and quit, to possession, since defendant's possession was not under a deed but merely under a parol agreement. Hodges v. Jones, 197 Miss. 107, 19 So. 2d 518 (1944), motion granted in part, 197 Miss. 107, 19 So. 2d 917 (1944).

Where tenancy of farm land for 1934 terminated on December 31, 1934, and proceeding was brought in January, 1935, after notice on January 9, 1935, to vacate, landlord was not entitled to apportionment of rent for hold-over period which terminated on March 9, 1935, based on 1934 rental. Graham v. Cauthen, 175 Miss. 751, 168 So. 58 (1936).

Landlord who had leased premises to third person had no right of action against old tenant to secure possession of land at end of term, where she was under no contract to give possession to lessee, or to oust tenant holding over. McMillan v. Best, 171 Miss. 811, 158 So. 488 (1935).

Judgment for landlord in statutory proceeding before justice to obtain possession is not conclusive upon title, though determination of title was involved. Vansant v. Dodds, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

Validity of constable's deed to execution creditor cannot be conclusively adjudicated in creditor's action against debtor under statute authorizing removal of holdover tenant, or tenant defaulting in rent; such statutory action being purely possessory. Vansant v. Dodds, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

Landlord cannot sue to eject tenant after sale of premises. Pinnix v. Jones, 127 Miss. 764, 90 So. 481 (1922).

Lessee holding over pending negotiations for renewal of lease, not entitled to renewal nor to hold under new term. Thomas Hinds Lodge No. 58, F. & A.M. v. Presbyterian Church, 103 Miss. 130, 60 So. 66 (1912).

Landlord not entitled to recover rent from tenant remaining in possession after notice upon expiration of term, under circumstances indicating no rent charged. Thomas Hinds Lodge No. 58, F. & A.M. v. Presbyterian Church, 103 Miss. 130, 60 So. 66 (1912).

Tenant has reasonable time to remove crop matured at termination of lease; matured crop at end of lease not a growing crop. Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77 (1911).

Where the tenant continues to occupy the premises, and enters upon another term without objection from the landlord, a tenancy for another term is thus created which cannot be terminated in the middle of the term. Usher v. Moss, 50 Miss. 208 (1874).

ATTORNEY GENERAL OPINIONS

A landlord should sue for eviction in the county where the leased premises are located. Shirley, Aug. 19, 2005, A.G. Op. 05-0406.

RESEARCH REFERENCES

ALR. What constitutes tenant's holding over of leased premises. 13 A.L.R.5th 169.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent-modern cases. 31 A.L.R.4th 1254.

Lessor's retention of past-due rental payments as precluding termination of lease and dispossession of lessee for nonpayment of rent. 39 A.L.R.4th 1204.

Reviewability before trial of order denying qualified immunity to defendant sued in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

When is eviction of tenant by private landlord conducted "under color of state law" for purposes of 42 USCS § 1983. 73 A.L.R. Fed. 78.

Am Jur. 16 Am. Jur. Pl & Pr Forms (Rev) Landlord and Tenant, Forms 151 et seq. (landlord's possessory remedies).

CJS. 52A C.J.S., Landlord and Tenant §§ 1335, 1336 et seq., 1361 et seq.

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 89-7-29. Affidavit to remove.

The landlord or lessor, his legal representatives, agents, or assigns, in order to have the benefit of such proceedings, shall make oath or affirmation of the facts which, according to the last preceding section, authorize the removal of the tenant, describing therein the premises claimed and the amount of rent due and when payable, and that the necessary notice has been given to terminate such tenancy.

SOURCES: Codes, 1857, ch. 41, art. 28; 1871, § 1648; 1880, § 1334; 1892, § 2548; 1906, § 2886; Hemingway's 1917, § 2384; 1930, § 2227; 1942, § 949.

Cross References — Right of landlord to remove tenant in manner prescribed by this Chapter for nonpayment of rent, not circumscribed by termination procedure specified in section 89-8-13, see § 89-8-13.

JUDICIAL DECISIONS

1. In general.

Proceedings to dispossess tenant for failure to pay rent must be strictly followed; error to dissolve injunction and dismiss bill where affidavit void. Downing v. Campbell, 131 Miss. 137, 95 So. 312 (1923).

Circuit court, on appeal thereto in proceeding by landlord to get possession of premises, trial therein being de novo, could render judgment for rent up to trial in circuit court though affidavit in lower court did not allege rent due. Stollenwerck v. Eure, 119 Miss. 854, 81 So. 594 (1919), error overruled, 120 Miss. 233, 82 So. 68 (1919).

To summarily remove a tenant for nonpayment of rent the affidavit and proof must show that the rent was due and unpaid, that three days' notice in writing requiring payment had been given and that the rent cannot be made by distress of the tenant's goods. Wilson v. Wood, 84 Miss. 728, 36 So. 609 (1904).

An affidavit in a proceeding to remove a tenant holding over under this section [Code 1942, § 949] is defective if it fails to state facts from which the court may determine that the relation of landlord and tenant existed and that the term has expired. Bowles v. Dean, 84 Miss. 376, 36 So. 391 (1904).

A proceeding to remove a tenant holding over should not be dismissed because of a defective affidavit unless the landlord declines to amend. Bowles v. Dean, 84 Miss. 376, 36 So. 391 (1904).

RESEARCH REFERENCES

ALR. What constitutes tenant's holding over of leased premises. 13 A.L.R.5th 169.

Commercial leases: application of rule that lease may be canceled only for "material" breach. 54 A.L.R.4th 595.

§ 89-7-31. Issuance of summons.

On receiving such affidavit, the county judge, justice, mayor, or other officer shall issue a summons, directed to the sheriff or any constable of the county, or the marshal of the city, town, or village wherein the premises, or some part thereof, are situated, describing the premises, and commanding him to require the person in possession of the same or claiming the possession thereof, forthwith to remove therefrom, or to show cause before the justice or other officer, on a day to be named not less than three (3) nor more than five (5) days from the date of the summons, why possession of the premises should not be delivered to the applicant.

SOURCES: Codes, 1857, ch. 41, art. 29; 1871, § 1649; 1880, § 1335; 1892, § 2549; 1906, § 2887; Hemingway's 1917, § 2385; 1930, § 2228; 1942, § 950.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 182 (writ of possession).

CJS. 52A C.J.S., Landlord and Tenant § 1375.

§ 89-7-33. Service of summons.

Such summons shall be served as a summons is served in other cases, if the tenant can be found; if not, then by putting up a copy in some conspicuous place on the premises where the tenant last or usually resided.

SOURCES: Codes, 1857, ch. 41, art. 30; 1871, § 1650; 1880, § 1336; 1892, § 2550; 1906, § 2888; Hemingway's 1917, § 2386; 1930, § 2229; 1942, § 951.

§ 89-7-35. Proceedings where no defense.

If, at the time appointed, it appear that the summons has been duly served, and if sufficient cause be not shown to the contrary, the magistrate shall issue his warrant to the sheriff or any constable of the county, or to a marshal of the city, town, or village where the premises, or some part thereof, are situated, commanding him to remove all persons from the premises, and to put the applicant into full possession thereof.

SOURCES: Codes, 1857, ch. 41, art. 31; 1871, § 1651; 1880, § 1337; 1892, § 2551; 1906, § 2889; Hemingway's 1917, § 2387; 1930, § 2230; 1942, § 952.

ATTORNEY GENERAL OPINIONS

If a justice court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court must immediately issue a warrant of removal according to §§ 89-7-35 or 89-7-41; the constable is entitled to a $25.00 fee for the service of the warrant as allowed by § 25-7-27(1)(b), but there is no provision for the justice court to charge any additional fee, other than the constable's fee, for the warrant of removal. Carter, Apr. 5, 2002, A.G. Op. #02-0157.

If a court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court shall immediately issue a warrant of removal. Once the landlord pays the constable fee for the removal warrant, the constable may immediately serve the warrant on the tenant. There is no need to wait ten days after a judgment for eviction before a removal warrant is issued. Riley, Dec. 5, 2003, A.G. Op. 03-0657.

If a court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court shall immediately issue a warrant of removal according to Sections 89-7-35 or 89-7-41. Shirley, Aug. 17, 2005, A.G. Op. 05-0201.

§ 89-7-37. Defense may be made.

The person in possession of such premises, or any person claiming possession thereof, may, at or before the time appointed in the summons for showing cause, file an affidavit with the magistrate who issued the same, denying the facts upon which the summons was issued; and the matters thus controverted may be tried by the magistrate.

SOURCES: Codes, 1857, ch. 41, art. 32; 1871, § 1652; 1880, § 1338; 1892, § 2552; 1906, § 2890; Hemingway's 1917, § 2388; 1930, § 2231; 1942, § 953.

JUDICIAL DECISIONS

1. In general.

Upon appeal defendant may file his counteraffidavit in the circuit court. Bowles v. Dean, 84 Miss. 376, 36 So. 391 (1904).

RESEARCH REFERENCES

ALR. Specificity of description of premises as affecting enforceability of lease. 73 A.L.R.4th 236.

§ 89-7-39. Continuances, subpoenas.

The magistrate may, at the request of either party, adjourn the hearing from time to time, one adjournment not to exceed ten (10) days, except by consent, and may issue subpoenas and attachments to compel the attendance of witnesses.

SOURCES: Codes, 1857, ch. 41, art. 35; 1871, § 1655; 1880, § 1339; 1892, § 2553; 1906, § 2891; Hemingway's 1917, § 2389; 1930, § 2232; 1942, § 954.

§ 89-7-41. Form of judgment for landlord.

If the decision be in favor of the landlord or other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff, constable, or other officer, commanding him forthwith to put such landlord or other person into possession of the premises, and to levy the costs of the proceedings of the goods and chattels, lands and tenements, of the tenant or person in possession of the premises who shall have controverted the right of the landlord or other person.

SOURCES: Codes, 1857, ch. 41, art. 36; 1871, § 1656; 1880, § 1340; 1892, § 2554; 1906, § 2893; Hemingway's 1917, § 2390; 1930, § 2233; 1942, § 955.

Cross References — Rent recoverable in action for unlawful entry and detainer, see § 11-25-21.

Judgment for plaintiff and writ of possession in action for unlawful entry and detainer, see §§ 11-25-23, 11-25-113.

ATTORNEY GENERAL OPINIONS

If a justice court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court must immediately issue a warrant of removal according to §§ 89-7-35 or 89-7-41; the constable is entitled to a $25.00 fee for the service of the warrant as allowed by § 25-7-27(1)(b), but there is no provision for the justice court to charge any additional fee, other than the constable's fee, for the warrant of removal. Carter, Apr. 5, 2002, A.G. Op. #02-0157.

If a court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court shall immediately issue a warrant of removal. Once the landlord pays the constable fee for the removal warrant, the constable may immediately serve the warrant on the tenant. There is no need to wait ten days after a judgment for eviction before a removal warrant is issued. Riley, Dec. 5, 2003, A.G. Op. 03-0657.

If a court makes a finding in favor of the landlord in a proceeding for an eviction or removal, the court shall immediately issue a warrant of removal according to Sections 89-7-35 or 89-7-41. Shirley, Aug. 17, 2005, A.G. Op. 05-0201.

RESEARCH REFERENCES

ALR. Measure and elements of damages for lessee's breach of covenant as to repairs. 45 A.L.R.5th 251.

§ 89-7-43. Judgment for defendant.

If the decision be in favor of the tenant, he shall recover costs of the applicant, and the magistrate shall issue execution therefor.

SOURCES: Codes, 1857, ch. 41, art. 37; 1871, § 1657; 1880, § 1341; 1892, § 2555; 1906, § 2892; Hemingway's 1917, § 2391; 1930, § 2234; 1942, § 956.

Cross References — Judgment for defendant in proceedings for unlawful entry and detainer, see §§ 11-25-27, 11-25-117.

JUDICIAL DECISIONS

1. In general.

Damages, if any, to be awarded against a landlord who unsucessfully appeals from a judgment in unlawful entry and detainer are not to be measured on the value of the land where the tenant makes no claim that he owns the land or has any right to its ownership as land. McKeithen v. Bush, 201 Miss. 664, 29 So. 2d 310 (1947), motion overruled, 201 Miss. 665, 30 So. 2d 83 (1947).

§ 89-7-45. Stay of proceedings.

If the proceedings be founded upon the non-payment of rent, the issuance of the warrant for the removal of the tenant shall be stayed if the person owing the rent shall, before the warrant be actually issued, pay the rent due and the costs of the proceedings, or give such security as shall be satisfactory to the magistrate, to the person entitled to the rent, for the payment thereof and costs in ten (10) days; and if the rent and costs shall not be paid accordingly, the warrant shall then issue as if the proceedings had not been stayed.

SOURCES: Codes, 1857, ch. 41, art. 38; 1871, § 1658; 1880, § 1342; 1892, § 2556; 1906, § 2894; Hemingway's 1917, § 2392; 1930, § 2235; 1942, § 957.

JUDICIAL DECISIONS

1. In general.

The right to stay proceedings on payment of rent, etc., exists after trial, on appeal, in the circuit court. Flanneken v. Wright, 64 Miss. 217, 1 So. 157 (1887).

§ 89-7-47. Record, appeals.

The magistrate before whom proceedings shall be had against a tenant holding over, shall keep a full record of his proceedings, and shall carefully preserve all papers in the cause, and the same costs shall be taxed and paid as are allowed for similar service in cases of unlawful entry and detainer, and the right of appeal shall exist as in such cases.

SOURCES: Codes, 1857, ch. 41, art. 39; 1871, § 1659; 1880, § 1343; 1892, § 2557; 1906, § 2895; Hemingway's 1917, § 2393; 1930, § 2236; 1942, § 958.

Cross References — Appeal from unlawful entry and detainer court, see § 11-51-83.

Appeals from judgment of justice of the peace in civil cases, see § 11-51-85.

JUDICIAL DECISIONS

1. In general.

Where a circuit court affirmed the decision of justice of peace for landlord in a suit to remove tenant for nonpayment of rent, the circuit court properly allowed the landlord rent up to the time of the judgment. Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838 (1955).

Circuit court on appeal in proceeding by landlord to get possession of premises, trial therein being de novo, may render judgment for rent up to trial in circuit court though affidavit in lower court did not allege rent due. Stollenwerck v. Eure, 119 Miss. 854, 81 So. 594 (1919), error overruled, 120 Miss. 233, 82 So. 68 (1919).

On appeal to the circuit court the tenant may for the first time make and file an affidavit denying the facts averred by the landlord, upon which the summons was issued, and will be entitled to a trial on the merits of the issue so made. Harvey v. Clark, 81 Miss. 166, 32 So. 906 (1902).

On appeal to the circuit court in proceedings against the tenant, a successful plaintiff may recover rent to the time of trial. Paxton v. Oliver, 70 Miss. 570, 12 So. 799 (1893).

The appeal lies as well in a proceeding against a tenant holding over after the expiration of his term as against a tenant who is in default for the nonpayment of rent. Flanneken v. Wright, 64 Miss. 217, 1 So. 157 (1887).

§ 89-7-49. Proceedings when tenant deserts premises.

If a tenant of lands, being in arrear for rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so that a sufficient distress cannot be had to satisfy the arrears of rent, any constable of the county may, at the request of the landlord, and upon due proof by affidavit that the premises have been deserted, leaving rent in arrear, and not sufficient distress thereon, go upon and view the premises, and upon being satisfied that the premises have been so deserted, he shall affix a notice, in writing, upon a conspicuous part of the premises, stating what day he will return to take a second view thereof, not less than five (5) days nor more than fifteen (15) days thereafter, and requiring the tenant then to appear and pay the rent due. At the time specified in the notice the constable shall again view the premises, and if, upon second view, the tenant shall not pay the rent due, or there shall not be sufficient distress upon the premises, then the justice court may put the landlord in possession of the premises, and the lease thereof to such tenant shall become void. The tenant may appeal to the circuit court from the proceedings of the justice court at any time within thirty (30) days after possession delivered, by serving notice in writing thereof upon the landlord, and by giving bond, with sufficient sureties, to be approved by the justice court, for the payment to the landlord of the costs of appeal, which may be adjudged against the tenant; and thereupon the justice court shall return the proceedings before him to the next term of the circuit court, and said court shall, at the return term, examine the proceedings in a summary way, and may order restitution to be made to the tenant, with costs of appeal, to be paid by the landlord; or in case of affirming the proceedings, shall award costs against the tenant and sureties in his bond.

SOURCES: Codes, 1857, ch. 41, art. 24; 1871, § 1643; 1880, § 1332; 1892, § 2546; 1906, § 2884; Hemingway's 1917, § 2382; 1930, § 2237; 1942, § 959; Laws, 1990, ch. 404, § 1, eff from and after July 1, 1990.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

If clause in lease prohibiting removal of property while rent was unpaid created equitable lien, it was not enforceable by statutory remedy of distress for rent. Lake v. Morson, 164 Miss. 401, 145 So. 337 (1933).

When tenant on shares abandons his contract, landlord may sue for damages. Weir v. Cooper, 122 Miss. 225, 84 So. 184 (1920).

No suit lies for rent before it is due; on abandonment of performance of share contract landlord may at once sue for breach. Weir v. Cooper, 122 Miss. 225, 84 So. 184 (1920).

RESEARCH REFERENCES

ALR. Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term. 50 A.L.R.4th 403.

Specificity of description of premises as affecting enforceability of lease. 73 A.L.R.4th 236.

What constitutes abandonment of residential or commercial lease-modern cases. 84 A.L.R.4th 183.

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant. 75 A.L.R.5th 1.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 870-872, 937.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Forms 381 et seq. (surrender, termination, and abandonment).

15 Am. Jur. Proof of Facts 2d 209, Landlord's Reasonable Efforts to Minimize Damages After Tenant's Breach of Lease.

25 Am. Jur. Proof of Facts 2d 51, Abandonment of Lease of Real Property.

26 Am. Jur. Proof of Facts 2d 525, Landlord's Acceptance of Abandonment or Surrender of Leased Premises.

CJS. 51C C.J.S., Landlord and Tenant §§ 120 et seq., 143, 174.

52A C.J.S., Landlord and Tenant, § 1323.

§ 89-7-51. Lien of landlord.

(1) Every lessor of land shall have a lien on the agricultural products of the leased premises, however and by whomsoever produced, to secure the payment of the rent and of money advanced to the tenant, and the fair market value of all advances made by him to his tenant for supplies for the tenant and others for whom he may contract, and for his business carried on upon the leased premises. This lien shall be paramount to all other liens, claims, or demands upon such products when perfected in accordance with Uniform Commercial Code Article 9 — Secured Transactions (Section 75-9-101, et seq.). The claim of the lessor for supplies furnished may be enforced in the same manner and under the same circumstances as his claim for rent may be; and all the provisions of law as to attachment for rent and proceedings under it shall be applicable to a claim for supplies furnished, and such attachment may be levied on any goods and chattels liable for rent, as well as on the agricultural products.

(2) All articles of personal property, except a stock of merchandise sold in the normal course of business, owned by the lessee of real property and situated on the leased premises shall be subject to a lien in favor of the lessor to secure the payment of rent for such premises as has been contracted to be paid, whether or not then due. Such lien shall be subject to all prior liens or

other security interests perfected according to law. No such articles of personal property may be removed from the leased premises until such rent is paid except with the written consent of the lessor. All of the provisions of law as to attachment for rent and proceedings thereunder shall be applicable with reference to the lessor's lien under this subsection.

SOURCES: Codes, 1880, § 1301; 1892, § 2495; 1906, § 2832; Hemingway's 1917, § 2330; 1930, § 2186; 1942, § 908; Laws, 1972, ch. 343, § 1; Laws, 2001, ch. 495, § 34, eff from and after Jan. 1, 2002.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Exclusion of landlord's lien from operation of Uniform Commercial Code relating to secured transactions, see § 75-9-104.

Liens generally, see §§ 85-7-1 through 85-7-9.

Enforcement of liens generally, see §§ 85-7-141 et seq.

JUDICIAL DECISIONS

1. In general.
2. Persons entitled to lien.
3. Advances and supplies.
4. Existence of relation of landlord and tenant.
5. —Tenant under land contract.
6. Rights and liabilities of sublessees.
7. Rights and liabilities of purchasers of agricultural products.
8. Waiver of, or estoppel to assert, lien.
9. Priority of lien.
10. Enforcement of lien.
11. Liability of landlord to persons supplying tenant.
12. Miscellaneous.

1. In general.

The landlord lien statute (§ 89-7-51) does not provide for the ejectment of a tenant from the leased premises for failure to pay rent, but merely gives a landlord a subordinate lien on all articles of personal property. Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994).

In determining whether a lien will be extended to include the proceeds of a crop sale, courts look to whether: (1) the crop lender was aware of the landlord/tenant relationship; (2) the crop lender was involved in the sale; (3) the crop lender obtained a subordination agreement from the landlord; or (4) whether the landlord expressly or impliedly waived its statutory lien. Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990).

Landlord Lien statute affords unpaid landlord no rights in property of third persons on landlord's premises. By analogy, landlord should not acquire lien under § 89-7-51(2) on property not belonging to lessee. Hicks v. Thomas, 516 So. 2d 1344 (Miss. 1987).

In determining whether landlord is entitled to lien on crops securing rent of tenant house off leased premises, question is whether house was reasonably necessary to enable tenants to properly carry out farming operations. Dale v. Webb, 166 Miss. 309, 146 So. 875 (1933).

Title to stolen crop when rent reserved therefrom held to be in tenant until division of the crop is made. Bethany v. State, 124 Miss. 870, 87 So. 410 (1921).

Under lease for year title to crop vests in tenant subject to landlord's lien. Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77 (1911).

Merchants receiving crop to ship out of state and credit on tenant's account held liable to extent of landlord's lien. Peets & Norman Co. v. Baker, 95 Miss. 576, 48 So. 898 (1909).

The lien given a landlord under this section [Code 1942, § 908] is effectual to secure the rent of the dwelling house appurtenant to the farm, as well as the rent of arable lands. Scroggins v. Foster, 76 Miss. 318, 24 So. 194 (1898).

A landlord has no lien upon his tenant's goods, other than agricultural products, and, before distress for rent, a bona fide purchaser of such goods, whether on or off the leased premises, will be protected. Richardson v. McLaurin, 69 Miss. 70, 12 So. 264 (1891).

The lien is only given upon the agricultural products, and is not affected by their removal from the premises. Henry v. Davis, 60 Miss. 212 (1882); Fitzgerald v. Fowlkes, 60 Miss. 270 (1882); Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

There is no lien, except on the agricultural products, before the levy of attachment. Marye v. Dyche, Gates, Gillespie & Co., 42 Miss. 347 (1869).

2. Persons entitled to lien.

A landlord holding the tenant's note for rent, who during the term and before the rent is due, conveys the rented land, cannot thereafter attach for the rent. The conveyance carries with it, as an incident, the note. Watkins v. Duvall, 69 Miss. 364, 13 So. 727 (1891).

One who was landlord, after conveying the premises to a third person, has no lien for supplies thereafter advanced by him during the term to enable the tenant to make a crop on the land. Watkins v. Duvall, 69 Miss. 364, 13 So. 727 (1891).

The assignment of the rent and lease carries with it the lien. Taylor v. Nelson, 54 Miss. 524 (1877); Newman v. Bank of Greenville, 66 Miss. 323, 5 So. 753 (1889).

3. Advances and supplies.

Under circumstances advances held made by landlord to tenant through third person, and so secured by landlord's lien. Moak v. Moak, 150 Miss. 289, 116 So. 286 (1928).

Fees for medical services rendered tenant and family are "advances for supplies" within lien statute. Moak v. Moak, 150 Miss. 289, 116 So. 286 (1928).

Lien on crop exists for supplies furnished previous year. Sprouse v. Davis, 141 Miss. 564, 106 So. 824 (1926).

Persons furnishing receiver money with which to gather tenant's cotton crop does not acquire lien on other cotton grown on leased premises. Goodwin v. Mitchell, 38 So. 657 (Miss. 1905).

Abandonment by tenant not justified by failure of landlord to furnish meat and clothing, unless landlord obligated himself to do so. Petty v. Leggett, 38 So. 549 (Miss. 1905).

Mules are "supplies," and taking a separate note for their price, reciting that a lien on them and the crop is retained until it is paid, is not a waiver of the landlord's lien. Trimble v. Durham, 70 Miss. 295, 12 So. 207 (1892).

The lien does not exist if the landlord merely guarantees the payment for supplies advanced by another. The relation of creditor and debtor must exist between the landlord and tenant to support the lien. Ellis v. Jones, 70 Miss. 60, 11 So. 566 (1892).

Advances of supplies for one year cannot be treated as advances for the next so as to be a lien on the products produced the latter year. Lumbley v. Gilruth, 65 Miss. 23, 3 So. 77 (1887).

4. Existence of relation of landlord and tenant.

Where lands were rented to several tenants under their agreements to pay one-third of the cotton and seed, with the landlord paying one-third of the cost of fertilizer, poison and ginning, the relationship of landlord and tenant came into existence and title to and possession of the crop was vested in the tenant, subject to the landlord's paramount lien to secure the payment of rent. Lewis v. Latham, 224 Miss. 107, 79 So. 2d 811 (1955).

Where former litigation between the parties to a deed of trust and the decree therein established that the parties were claiming title to the land in question adversely to each other, the relation of landlord and tenant necessary to found a landlord's lien for agricultural products grown on the land during such period of litigation did not exist; and the record in such litigation was an estoppel on the mortgagee to claim that relation. Riley v. Hardy, 185 Miss. 765, 189 So. 514 (1939).

The relation of landlord and tenant must exist as a result of contract, either express or implied, in order to give the former a lien on the agricultural products produced on the land. Riley v. Hardy, 185 Miss. 765, 189 So. 514 (1939).

Relation of landlord and tenant did not exist between mortgagors disputing right to possession of purchaser under deed of trust so as to create lien on agricultural products. Raleigh State Bank v. Williams, 150 Miss. 766, 117 So. 365 (1928).

No particular form of expression is necessary to create a lease. Board of Supvrs. v. Imperial Naval Stores Co., 93 Miss. 822, 47 So. 177 (1908).

Lease of land for 99 years or more is governed by principles of estates for years and gives no right to fee. Moss Point Lumber Co. v. Board of Supvrs., 89 Miss. 448, 42 So. 290 (1906).

A contract that one of the parties is to furnish the other a dwelling house for himself and family with adjacent lands, and with teams and utensils, and that such other is to cultivate the land and pay one-half the crop for the use of the property, creates the relation of landlord and tenant. Schlicht v. Callicott, 76 Miss. 487, 24 So. 869 (1899).

5. —Tenant under land contract.

Contract to convey may stipulate that annual notes in payment will be collected as rental value of the land. Pennington v. Richie, 102 Miss. 133, 58 So. 657 (1912).

Purchaser in possession under parol contract did not create relation of landlord and tenant by executing rent notes promising to pay one bale of cotton to vendor if he should decide not to take the place. Pennington v. Richie, 102 Miss. 133, 58 So. 657 (1912).

Upon vendee in possession under bond for title failing to pay installments, parties assumed relation of landlord and tenant. W.L. Robinson Co. v. Weathersby, 101 Miss. 724, 57 So. 983 (1912).

Peremptory instruction for rent held erroneous where notes given for the purchase price. Caston v. Turner, 95 Miss. 303, 48 So. 721 (1909).

Under contract to convey, overpayment on first installment should be applied on second year's rent. Flowers-Carruth Co. v. J.L. Moyse & Bros., 95 Miss. 174, 48 So. 523 (1909).

Where purchase money notes are given and the deed specified that they shall be considered as rent, and that a landlord's lien is retained, the holder has a valid equitable lien upon the agricultural products. Maynard v. Cocke, 71 Miss. 493, 15 So. 788 (1894).

6. Rights and liabilities of sublessees.

Landlord held entitled to lien on crops, whether produced by tenant or subtenant. Dale v. Webb, 166 Miss. 309, 146 So. 875 (1933).

Subtenant by reason of liability of his crops to landlord's lien, held a surety for original tenant's debt for supplies. Powell v. Tomlinson, 129 Miss. 354, 92 So. 226 (1922), error overruled, 129 Miss. 658, 92 So. 583 (1922).

Lessor held not entitled to retain goods of deceased lessee to pay indebtedness of sublessee. Hyatt v. Southern R. Co., 88 Miss. 546, 41 So. 3 (1906).

Lessee held not liable for advances made to sublessee without his consent. Hyatt v. Southern R. Co., 88 Miss. 546, 41 So. 3 (1906).

Where one has purchased from the tenant crops subject to lien, a subtenant may compel the landlord first to enforce the liability of such purchaser for the value of the crop purchased. Applewhite v. Nelms, 71 Miss. 482, 14 So. 443 (1893).

A subtenant occupies the relation of surety for the rent due by the tenant, and in equity may compel the landlord to first resort to the estate of the tenant and preserve whatever securities he may have from the tenant, so that the subtenant, whose crop is taken for rent, may be subrogated thereto. Applewhite v. Nelms, 71 Miss. 482, 14 So. 443 (1893); Dale v. Webb, 166 Miss. 309, 146 So. 875 (1933); Hooks v. Burns, 168 Miss. 723, 152 So. 469 (1934).

7. Rights and liabilities of purchasers of agricultural products.

Landlord's lien on agricultural products as security for unpaid rent is paramount to rights of purchaser of warehouse receipts for product issued in tenant's name in absence of proof that tenant has dealt honestly with his landlord. Phillips v. Box, 204 Miss. 231, 37 So. 2d 266 (1948).

Bona fide purchaser of warehouse receipts held to acquire stored cotton free from landlord's lien. McGee v. Carver, 141 Miss. 463, 106 So. 760 (1926).

Purchaser of cotton from tenant held liable to landlord for rent. Walker-Durr Co. v. Mitchell, 97 Miss. 231, 52 So. 583 (1910).

A landlord has a lien to secure his rent and supplies for the current year on all agricultural products raised on the leased premises and may assert it against the products or the purchaser, with or without notice of such products. Ball, Brown & Co. v. Sledge, 82 Miss. 749, 35 So. 447 (1903); Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

The lien does not follow the agricultural products out of the state, and one who purchases them out of the state takes free of the lien, although he had notice of its existence. Millsaps v. Tate, 75 Miss. 150, 21 So. 663 (1897); Ball, Brown & Co. v. Sledge, 82 Miss. 749, 35 So. 447 (1903).

A commission merchant in another state who has made advances to a planter and received and sold in good faith cotton shipped by him for his account, is not answerable for the proceeds thereof to one who had a landlord's lien on the cotton when shipped. Chism v. Thomson, 73 Miss. 410, 19 So. 210 (1896).

A purchaser of agricultural products grown on land in the adverse possession of another is not liable to account to the true owner of the land for the value of such products, even though he knew at the time he bought them of the want of title to the land of the occupant and who was the real owner of the land. Morgan v. Long, 73 Miss. 406, 19 So. 98, 55 Am. St. R. 541 (1895).

Neither ignorance as to the tenancy by a purchaser, nor false statement by the tenant as to his right to sell will defeat the landlord's claim. Warren v. Jones, 70 Miss. 202, 14 So. 25 (1892).

The landlord's right to recover from one to whom the agricultural products grown on the demised premises have been sold by the tenant is not affected by want of notice by the purchaser that the rent is due; the rule of caveat emptor applies. Eason v. Johnson, 69 Miss. 371, 12 So. 446 (1891).

The lien will prevail against a bona fide purchaser for value. Newman v. Bank of Greenville, 66 Miss. 323, 5 So. 753 (1889); W.L. Robinson Co. v. Weathersby, 101 Miss. 724, 57 So. 983 (1911).

It being a crime for a person with notice of the lien to remove the products from the leased premises without the landlord's consent, the landlord can maintain an action for damages against the purchaser with notice of products subject to the lien for rent, etc. Cohn v. Smith, 64 Miss. 816, 2 So. 244 (1887).

8. Waiver of, or estoppel to assert, lien.

A landlord did not waive her right to the statutory landlord's lien merely because the lease contract did not specifically refer to the landlord's lien statute since the landlord's lien exists by positive law without writing or record. Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990).

A landlord's conduct did not constitute a waiver of the landlord's lien, even though the landlord permitted the lessee to harvest, market and sell the crops as he saw fit, where, for the most part, rent was paid prior to the harvest and sale of crops, and the lender had actual notice of its debtor's landlord/tenant relationship. Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990).

A landlord's lien under this section [Code 1942, § 908] can be waived. Martin v. Leflore Bank & Trust Co., 220 Miss. 106, 70 So. 2d 66 (1954).

Proof of waiver of landlord's lien on agricultural products for rent must be established by preponderant testimony which affirmatively shows an agreement by landlord, or conduct tantamount thereto, that tenant may deal with product as if free of any lien. Phillips v. Box, 204 Miss. 231, 37 So. 2d 266 (1948).

Waiver of landlord's lien in favor of purchaser of warehouse receipts for product, issued in tenant's name, is not shown by evidence that landlord accepted farm equipment as part payment of rent and offered to accept tenant's notes for balance, which offer tenant ignored and had cotton crop ginned, baled and placed in warehouse taking warehouse receipts in his own name and selling warehouse receipts, all without knowledge of landlord who attached cotton promptly after locating it in warehouse. Phillips v. Box, 204 Miss. 231, 37 So. 2d 266 (1948).

Evidence held to establish that landlord did not, by its conduct, impliedly permit tenant to store cotton in compress, take warehouse receipts therefor in tenant's name, and dispose of receipts, so as to waive landlord's lien on cotton. Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

Evidence held not to warrant finding that landlord clothed tenant with indicia of ownership of cotton, or was negligent, or lacking in vigilance, so as to be estopped from asserting lien on cotton as against bona fide purchasers of negotiable warehouse receipts, issued in name of tenant, for cotton. Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

To effect waiver of landlord's lien on agricultural products, evidence must preponderate that landlord either affirmatively agreed to permit, or by his conduct and course of pleadings permitted, tenant to deal with agricultural products as though they had been freed from landlord's lien. Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

Waiver of lien of rent held limited, and to give no right to buy from tenant. Pitts v. Baskin, 140 Miss. 443, 106 So. 10 (1925).

Landlord held estopped to assert lien on crops. Judd v. Delta Grocery & Cotton Co., 133 Miss. 866, 98 So. 243 (1923).

Landlord who habitually permits sharecrop tenant to sell products cannot enforce landlord's lien against or recover value of products from good faith purchaser. Phillips v. Thomas, 128 Miss. 729, 91 So. 420 (1922).

Landlord permitting tenant to sell cotton and receiving rent from proceeds, held estopped to assert lien for advances where he gave no notice thereof to purchaser. A.C. Seavey & Sons v. Godbold, 99 Miss. 113, 54 So. 838 (1911).

A landlord who has waived his lien in favor of one who advances supplies to the tenant on the security of a trust deed on his cotton crop, after receiving from the tenant four bales and mingling them with his own, is estopped to deny that a bale of cotton seized by the trustee was grown by the tenant on the premises. Alexander v. Zeigler, 84 Miss. 560, 36 So. 536 (1904).

A landlord who waives his lien for a specified sum to enable his tenant to secure advances from another by a deed of trust on his crops is bound by the waiver, although the deed of trust recites that the advances were to be used in making crops on other lands also and does not expressly require advances to the full extent of the waiver. Dreyfus v. W.A. Gage & Co., 84 Miss. 219, 36 So. 248 (1904).

9. Priority of lien.

Unless the crop lender has taken steps to subordinate a landlord's statutory priority, the landlord's interest in the proceeds of a crop sale will be paramount to the crop lender who receives the proceeds. The landlord has the inside track in a priority clash over the proceeds of a crop sale. Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990).

Unless a landlord has expressly or impliedly waived the statutory landlord's lien, its rights are superior to all other interests, including those created by Chapter 9 of the Uniform Commercial Code. Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990).

Where the bank advances money to a tenant who with the landlord gave the bank a trust deed and the landlord taking a subordinate trust deed to tenant's farm machinery and equipment and later the bank without knowledge of the landlord advanced more money to the tenant for the operation of the farm, and the tenant paid the bank from proceeds of sale of crops, the bank applying the proceeds on the first loan and also on loan advanced without knowledge of landlord, the landlord had a superior lien on the crops because the bank was not authorized to apply proceeds on the loan made without knowledge of landlord. Cavins v. Planters Bank & Trust Co., 187 F.2d 906 (5th Cir. 1951).

Plaintiff held to have waived lien for ginning charges on cotton by delivering to landlord without notice of his lien. Patterson v. Jones-Wilson Mercantile Co., 117 Miss. 355, 78 So. 294 (1918).

Landlord's lien or that of seller under contract to convey is superior to lien of deed of trust given by tenant on crop for advances of supplies. Bedford v. Gartrell, 88 Miss. 429, 40 So. 801 (1906).

Landlord's lien held superior to that of person furnishing money to tenant with which to gather crop. Goodwin v. Mitchell, 38 So. 657 (Miss. 1905).

The owner of a cotton gin and press who gins and bales cotton, furnishing the bagging and ties, and who is paid therefor by the tenant, has a lien thereon superior to all other liens for his services, where its preparation for market is not otherwise provided for by the landlord or other interested parties. Duncan v. Jayne, 76 Miss. 133, 23 So. 392 (1898).

10. Enforcement of lien.

In order for a landlord to enforce the statutorily-created lien on a tenant's personal property, he or she must follow the attachment for rent statutes (§§ 89-7-55 through 89-7-125). Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994).

The landlord is not confined to the statutory remedy; the lien is broader. Henry v. Davis, 60 Miss. 212 (1882); Fitzgerald v. Fowlkes, 60 Miss. 270 (1882); Cohn v. Smith, 64 Miss. 816, 2 So. 244 (1887); Newman v. Bank of Greenville, 66 Miss. 323, 5 So. 753 (1889).

The lien can be enforced after the termination of the lease. Fitzgerald v. Fowlkes, 60 Miss. 270 (1882).

11. Liability of landlord to persons supplying tenant.

Landlord waiving lien in favor of person supplying tenant, who took deed of trust on crop, liable to extent of waiver on collecting note out of crop; before landlord can be held on waiver of lien on crops raised by tenant by person holding deed of trust from tenant, other securities embraced therein must be resorted to. H. & C. Newman, Inc. v. Delta Grocery & Cotton Co., 138 Miss. 683, 103 So. 373 (1925), error overruled, 138 Miss. 696, 104 So. 157 (1925).

The landlord, in an action against him and the tenant, cannot be held liable for goods sold to the tenant merely upon proof that he waived in plaintiff's favor his landlord's lien on the crop and afterwards appropriated the same. Whether he would be liable in another form of action is not decided. Chism v. Alcorn, 71 Miss. 506, 15 So. 73 (1894).

12. Miscellaneous.

A landlord's actions in locking up a tenant's possessions pursuant to § 89-7-51(2) did not violate due process requirements where the landlord failed to use the attachment for rent statutes; since § 89-7-51 did not authorize the landlord to use self-help to seize the tenant's property, there was no state action. Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994).

Landlord is liable for conversion of personal property belonging to tenant found on leased premises on taking possession because of nonpayment of rent. Clark v. Service Auto Co., 143 Miss. 602, 108 So. 704, 49 A.L.R. 511 (1926).

Lease contract that landlord may reenter without legal proceedings is binding to extent that landlord, entitled to possession unlawfully withheld, may re-enter without breaking doors or passages of ingress and without personal violence. Clark v. Service Auto Co., 143 Miss. 602, 108 So. 704, 49 A.L.R. 511 (1926).

Landlord, undertaking to sell tenant's property and settle with subtenants and heirs without taking out letters of administration or proceeding according to statutes, held liable as administrator de son tort. Blount v. Phillips, 142 Miss. 286, 107 So. 21 (1926).

No suit lies for rent before it is due; on abandonment of performance of share contract landlord may at once sue for breach. Weir v. Cooper, 122 Miss. 225, 84 So. 184 (1920).

Landlord with knowledge of deed of trust, who had waived his lien except for rent in favor of such deed of trust, who sold the crop himself and after deducting amount due him paid balance to the tenant instead of the mortgagee, was guilty of conversion. Evans v. Carpenter, 115 Miss. 572, 76 So. 550 (1917).

Creditor secured by deed of trust, not excused for failure to enter satisfaction of deed of trust on margin of record, where crop delivered in satisfaction of debt with landlord's consent, though being liable for rent. Coon v. Robinson Mercantile Co., 110 Miss. 700, 70 So. 884 (1916).

An assignee of notes given by a tenant to his landlord for rent cannot assert his lien against one who makes advances to the tenant on the security of the landlord's waiver and the tenant's trust deed on the crops when he has concealed his ownership of the notes and induced him to believe that the landlord's waiver and the tenant's trust deed will give him first lien. Dreyfus v. W.A. Gage & Co., 84 Miss. 219, 36 So. 248 (1904).

A creditor receiving in this state in payment of his debt cotton taken from him under a landlord's lien may enforce repayment from the debtor, although he had executed a receipt in full upon receiving the cotton. He cannot do this, however, if he received the cotton out of the state. Ball, Brown & Co. v. Sledge, 82 Miss. 749, 35 So. 447 (1903).

RESEARCH REFERENCES

ALR. Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 545 et seq.

7 Am. Jur. Legal Forms 2d, Crops § 80:26 (lease-provision-lessor's title in crops until payment of rent).

11B Am. Jur. Legal Forms 2d, Leases of Real Property §§ 161:1134-161:1136 (waiver of lessor's lien).

12 Am. Jur. Legal Forms 2d, Liens § 165:22 (notice of landlord's lien and of sale).

CJS. 52 C.J.S., Landlord and Tenant §§ 1199 et seq.

§ 89-7-53. Lien for live stock, implements and vehicles.

A landlord shall have, for one (1) year, a lien for the reasonable value of all live stock, farming tools, implements and vehicles furnished by him to his tenant, upon the property so furnished and, as an additional security therefor, upon all the agricultural products raised upon the leased premises. The said property so furnished shall be considered as supplies and the lien therefor may be enforced accordingly. Such lien shall be a superior and first lien when perfected in accordance with Uniform Commercial Code Article 9 — Secured Transactions (Section 75-9-101 et seq.), and need not otherwise be evidenced by writing.

SOURCES: Codes, 1892, § 2496; 1906, § 2833; Hemingway's 1917, § 2331; 1930, § 2187; 1942, § 909; Laws, 2001, ch. 495, § 35, eff from and after Jan. 1, 2002.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Materialman's lien, see § 85-7-131.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 560.

CJS. 52 C.J.S., Landlord and Tenant §§ 1227 et seq.

§ 89-7-55. Attachment for rent and supplies; who entitled to and for what.

An attachment or distress may be sued out by the lessor of lands, his executors, administrators, or assigns. It may be had for rent of the leased premises due and in arrear, or to become due, as the case may be, and for advances made by the landlord or his administrator or executor for supplies for the tenant and others for whom the tenant may have contracted and for his business carried on upon the leased premises.

SOURCES: Codes, 1892, § 2501; 1906, § 2838; Hemingway's 1917, § 2336; 1930, § 2188; 1942, § 910.

Cross References — Attachments against debtors generally, see §§ 11-33-1 et seq.

Fee of officer issuing attachment or distress for rent or supplies, see § 25-7-77.

Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Distraint of goods removed before debt becomes due, see § 89-7-77.

Tenant's remedy against landlord for improper distress, see § 89-7-115.

JUDICIAL DECISIONS

1. In general.
2. Claims within scope of statute.
3. Effect of transfer of title to leased property.
4. Rights of assignee of rent note.
5. Sale of tenant's goods; assignment for creditors.
6. Liability of sublessee.
7. Procedure.

1. In general.

In order for a landlord to enforce the statutorily-created lien on a tenant's personal property, he or she must follow the attachment for rent statutes (§§ 89-7-55 through 89-7-125). Bender v. North Meridian Mobile Home Park, 636 So. 2d 385 (Miss. 1994).

Attachment for rent is not of itself judicial proceeding. Barlow v. Serio, 129 Miss. 432, 91 So. 573 (1922).

Distress for rent, not being a judicial proceeding, depends for its validity upon compliance with the statute in making the required affidavit and bond. Pate v. Shannon, 69 Miss. 372, 13 So. 729 (1891).

There must be a lease to entitle to the remedy. Tifft v. Verden, 19 Miss. (11 S. & M.) 153 (1848).

2. Claims within scope of statute.

Clause in lease prohibiting removal of property while rent unpaid, if creating equitable lien, was not enforceable by statutory remedy of distress for rent. Lake v. Morson, 164 Miss. 401, 145 So. 337 (1933).

Stipulation for attorney's fee in rent note not enforceable in attachment for rent. O'Keefe v. McLemore, 125 Miss. 394, 87 So. 655 (1921).

The statute only covers a demand for rent. An agreement of the tenant as part of the expressed consideration of the lease, to pay as rent a debt which is not such in fact, will not change this. Paxton v. Kennedy, 70 Miss. 865, 12 So. 546 (1893).

A promise to pay the taxes for a given year on a certain tract of land for the rent of premises is sufficiently definite as to amount to give the landlord a lien. Roberts v. Sims, 64 Miss. 597, 2 So. 72 (1887).

It will be sufficient if the amount of the rent can be ascertained by calculation. Brooks v. Cunningham, 49 Miss. 108 (1873); Thrasher v. Gillespie, 52 Miss. 840 (1876); Roberts v. Sims, 64 Miss. 597, 2 So. 72 (1887).

The rent must be definite. Briscoe v. McElween, 43 Miss. 556 (1870).

3. Effect of transfer of title to leased property.

The maker of a rent note, payable to bearer, and transferred in good faith for value before maturity, cannot show as a failure of consideration of the note that the title of his lessor passed to another before the term began. Davis v. Blanton, 71 Miss. 821, 15 So. 132 (1894).

A landlord who takes the note of his tenant for rent, and afterwards, during the term and before the rent is due, conveys the rented land to another, cannot thereafter attach for the rent. Watkins v. Duvall, 69 Miss. 364, 13 So. 727 (1891).

The purchaser of land at partition sale is entitled to the rent falling due after his purchase, if not expressly reserved, and may distrain therefor, notwithstanding a rent note previously given therefor had been assigned by the landlord to another, who contests the purchaser's right to such rent. Kessee v. Sloan, 69 Miss. 369, 11 So. 631 (1892).

4. Rights of assignee of rent note.

The assignee of a rent note may distrain for the amount thereof. Coker v. Britt, 78 Miss. 583, 29 So. 833 (1901).

The assignee of a rent note who has advanced supplies to the tenant on a parol agreement that he should be subrogated to all the rights of the landlord in respect thereto, is not made landlord thereby and cannot distrain for the supplies. Coker v. Britt, 78 Miss. 583, 29 So. 833 (1901).

5. Sale of tenant's goods; assignment for creditors.

Bona fide purchaser of tenant's goods, other than agricultural products, before distress for the rent, is protected. White v. Miazza-Woods Const. Co., 122 Miss. 213, 84 So. 181 (1920).

Goods liable to be attached for rent, assigned to an assignee in an ordinary voluntary assignment for creditors, may still be subjected to the landlord's demand. Paine v. Sykes, 72 Miss. 351, 16 So. 903 (1895).

6. Liability of sublessee.

There is no privity of contract between a landlord and a subtenant, and the former cannot maintain an attachment for rent against the latter. Ashley v. Young, 79 Miss. 129, 29 So. 822 (1901).

7. Procedure.

The agent must carry on the proceedings in the landlord's name. Parker v. Stovall, 31 Miss. 446 (1856).

RESEARCH REFERENCES

ALR. What sort of claim, obligation, or liability is within contemplation of statute providing for attachment, or giving right of action for indemnity, before a debt or liability is due. 58 A.L.R.2d 1451.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 591, 615.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 134 (warrant for distraint of tenant's personalty to secure payment of rent).

CJS. 52 C.J.S., Landlord and Tenant §§ 1259, 1272 et seq.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 89-7-57. How obtained.

To obtain such attachment or distress, the party entitled thereto, his agent or attorney, shall make complaint on oath before a justice of the peace, averring the facts which entitle the party seeking it to the remedy; and, if anything be demanded on account of supplies, there shall be filed with the complaint an itemized bill of particulars thereof. The complainant shall enter into bond with sufficient sureties, payable to the tenant, his executor or administrator, in a penalty equal to double the sum claimed to be due, conditioned to pay all such damages as may be sustained by the obligee by the wrongful suing out of the writ, and all costs that may be awarded against the principal obligor.

SOURCES: Codes, 1892, § 2502; 1906, § 2839; Hemingway's 1917, § 2337; 1930, § 2189; 1942, § 911.

JUDICIAL DECISIONS

1. In general.

Judgment for lessee against lessor for amount by which total of sums agreed to be deducted from monthly rent and paid lessor's creditor by lessee exceeded rent for period before partial destruction of leased mill by fire will not be affirmed on remittitur of amount exceeding sums deductible for such period only, but must be reversed and cause remanded for entry of judgment in proper amount. Moore-Curry Lumber Co. v. Wogan, 170 Miss. 512, 155 So. 329 (1934).

Attorney's fees are recoverable in suit for damages for attachment for rent. Wigginton v. Moore, 147 Miss. 169, 113 So. 326 (1927).

Person acting as agent in renting land may not sue out attachment for rent. Wigginton v. Moore, 147 Miss. 169, 113 So. 326 (1927).

In replevin for rent due where the attachment writ was not signed or sworn to, but the landlord testified that he had verified his complaint, which was denied, it was error to overrule a motion to quash the attachment and to refuse to submit the question to the jury. Wolf v. Simmons, 75 Miss. 539, 23 So. 586 (1898).

Distress for rent, not being a judicial proceeding, depends for its validity upon compliance with the statute in making the required affidavit and bond. Pate v. Shannon, 69 Miss. 372, 13 So. 729 (1891).

A landlord cannot unite several distinct claims for different parcels of land, under different demises, in a single attachment for rent; He must resort to distinct proceedings for each. Briscoe v. McElween, 43 Miss. 556 (1870).

ATTORNEY GENERAL OPINIONS

Justice Court had jurisdiction over matter where landlord sought to enforce lien on personal property of tenant in amount of $7,000. Formby, March 23, 1994, A.G. Op. #94-0122.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 615.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Forms 132, 133 (landlord's bond in distress proceedings).

CJS. 52 C.J.S., Landlord and Tenant §§ 1287 et seq.

§ 89-7-59. Before whom complaint made.

Such complaint and bond may be made before any justice of the peace of the county in which the leased premises, or some part thereof, may be situated, or of any county in which the property, or some part thereof, sought to be distrained or seized may be found.

SOURCES: Codes, 1892, § 2503; 1906, § 2840; Hemingway's 1917, § 2338; 1930, § 2190; 1942, § 912.

Editor's Note — Pursuant to Miss. Const. Art. 6, Section 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

Cross References — Powers and duties of justice court judges generally, see §§ 11-9-101 et seq.

JUDICIAL DECISIONS

1. In general.

Judgment for lessee against lessor for amount by which total of sums agreed to be deducted from monthly rent and paid lessor's creditor by lessee exceeded rent for period before partial destruction of leased mill by fire will not be affirmed on remittitur of amount exceeding sums deductible for such period only, but must be reversed and cause remanded for entry of judgment in proper amount. Moore-Curry Lumber Co. v. Wogan, 170 Miss. 512, 155 So. 329 (1934).

The mayor of a municipality who is ex officio a justice of the peace, may issue the attachment, and his jurisdiction in such case is co-extensive with the county. Smith v. Jones, 65 Miss. 276, 3 So. 740 (1888).

The affidavit need not be made before the same officer who issues the writ, nor before an officer in the same county in which the writ is to run, but can be made before any officer authorized to administer oaths. Cassedy v. Mayers, 64 Miss. 356, 1 So. 510 (1887).

§ 89-7-61. Writ.

When the complaint shall have been made and bond given, and approved by the justice, it shall be his duty to issue a distress warrant or attachment-writ, commanding the seizure of the agricultural products, if any, upon which the party instituting the proceedings shall have claimed a lien, and also commanding the officer to distrain the goods and chattels other than the agricultural products of such tenant, if necessary, and deal with the same as provided by law; the entire seizure and distraint to be of value sufficient to satisfy the sum demanded with interest and costs.

SOURCES: Codes, 1892, § 2504; 1906, § 2841; Hemingway's 1917, § 2339; 1930, § 2191; 1942, § 913.

JUDICIAL DECISIONS

1. In general.

Judgment for lessee against lessor for amount by which total of sums agreed to be deducted from monthly rent and paid lessor's creditor by lessee exceeded rent for period before partial destruction of leased mill by fire will not be affirmed on remittitur of amount exceeding sums deductible for such period only, but must be reversed and cause remanded for entry of judgment in proper amount. Moore-Curry Lumber Co. v. Wogan, 170 Miss. 512, 155 So. 329 (1934).

A seizure and sale by a town marshal acting as constable without the limits of the town and the supervisor's district in which the town is situated, under a distress warrant issued by the mayor of such town, are invalid and confer no title upon the purchaser at the sale. Riley v. James, 73 Miss. 1, 18 So. 930 (1895).

RESEARCH REFERENCES

CJS. 52 C.J.S., Landlord and Tenant §§ 1286 et seq.

§ 89-7-63. Form of affidavit.

The affidavit for an attachment for rent and supplies, or either, may be in the following form, viz.:

"State of Mississippi,
________ County.

"Before me, ________, a justice of the peace of the County of ________, came ________, who, being duly sworn, says on oath: That ________ [the tenant] is indebted to him [or if the affidavit be made by an agent or attorney, strike out 'him' and insert the name of the landlord or person to whom the rent is due, and add after the landlord's name, 'of whom the affiant is agent'] in the sum of ________ dollars for rent in arrears [or if the rent be not due, strike out the words 'in arrears,' and insert 'to become due on the ________ day of ________, A.D. ________'] by virtue of a lease for the term commencing on the ________ day of ________, A.D. ________, and ending on the ________ day of ________, A.D. ________ of land situated in ________ County, and described as [here describe the leased premises; it is well to describe by name, if it has one, or by its occupants, and if such be the case it would be well to say 'and occupied by said ________, tenant, during the year ________'].

"And the said ________, the tenant, is further indebted to affiant [or if the oath be made by an agent or attorney, strike out 'affiant' and insert the name of the landlord or person to whom the debt is due] in the further sum of ________ dollars, now due [if the debt be not due, strike out the words 'now due,' and insert 'to become due on the ________ day of ________, A.D.'] ________ of which supplies a bill of particulars is attached hereto. Affiant [or if made by an agent or attorney, say 'affiant's said principal'] claims a lie the following agricultural products raised during the year ________, on the said leased premises [here describe the products, giving their location, if known, for the officer's guidance].

"Sworn to and subscribed before me, this the ________ day of ________, A.D. ________

________________, J.P."

(a) If the attachment be for rent only, strike out all relating to supplies; and if the claim be for supplies only, strike out all relating to the sum due for rent, and alter the form to suit the case.

(b) If the claim be not due, add to the form the following words: "And affiant has just cause to suspect, and does verily believe that the said tenant will remove [or has removed, as the case may be] his effects from said leased premises before said claim [or claims] be or shall become due, so that a distress or seizure cannot be made therefor, or so as to impair the landlord's lien on the agricultural products raised on the premises."

(c) If the rent be for part of the crop, or other thing than money, the affidavit should state it as it is, giving the money value of what is due.

SOURCES: Codes, 1892, § 2505; 1906, § 2842; Hemingway's 1917, § 2340; 1930, § 2192; 1942, § 914.

Editor's Note — Pursuant to Miss. Const. Art. 6, Section 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

JUDICIAL DECISIONS

1. In general.

Evidence sustained finding that new oral contract under which tenant was to pay what he could as reasonable rent for possession of land had replaced written contract, and verdict that landlord's attachment for rent was wrongfully sued out. Graham v. Swinney, 174 Miss. 579, 165 So. 438 (1936).

Judgment for lessee against lessor for amount by which total of sums agreed to be deducted from monthly rent and paid lessor's creditor by lessee exceeded rent for period before partial destruction of leased mill by fire will not be affirmed on remittitur of amount exceeding sums deductible for such period only, but must be reversed and cause remanded for entry of judgment in proper amount. Moore-Curry Lumber Co. v. Wogan, 170 Miss. 512, 155 So. 329 (1934).

In action by tenant's wife to replevy trucks which were attached by landlord as tenant's, whether wife was entitled to replevy, held for jury. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Claimant of trucks which were attached was required to show that they were bought in good faith for valuable consideration before levy was made. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Stranger claimant is entitled to reasonable damages for wrongful attachment under same circumstances as tenant is entitled under statute. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Tenant's wife who sought to replevy trucks wrongfully attached by landlord was entitled to reasonable attorney's fees, if prevailing. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Landlord had no lien upon trucks which he attached and which were sold by tenant to his wife prior to attachment. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Tenant's wife who showed deed of sale to her reciting valid consideration for tenant's trucks attached by landlord having made prima facie case, landlord had burden to establish fraud or other defense. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Recital of valid consideration in deed of conveyance between husband and wife being prima facie true, burden of showing falsity of such recital rests upon party attacking deed. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Affidavit of landlord as to lien to secure advances not conclusive; where evidence conflicting, issue should be submitted to jury. Striplin Cotton Co. v. Miller, 130 Miss. 430, 94 So. 227 (1922).

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 125 (attachment affidavit).

§ 89-7-65. Form of bond.

The bond for an attachment for rent or supplies may be in the following form, viz.:

"We, ________, principal, and ________ and ________, sureties, bind ourselves to pay ________ the sum of ________ dollars, unless the said principal obligor herein shall pay to the said ________ all such damages as he shall sustain by reason of the wrongful suing out of an attachment for rent and supplies [if for rent only, strike out the words 'and supplies;' and if for supplies only, strike out the words 'rent and'] in favor of said principal obligor against the said obligee for ________ dollars, for rent and supplies [if for rent only, strike out the words 'and supplies;' and if for supplies only, strike out the words 'rent and'] due and in arrears [or if the attachment be for a debt to become due, strike out the words 'due and in arrears,' and insert 'to become due on the ________ day of ________, A.D. ________'] upon certain leased premises, in ________ County.

"Witness our hands, this the ________ day of ________, A.D. ________

"________________,
________________"

"The above bond is approved by me, this ________ day of ________, A.D. ________.

"________________, J.P."

SOURCES: Codes, 1892, § 2506; 1906, § 2843; Hemingway's 1917, § 2341; 1930, § 2193; 1942, § 915.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Forms 132, 133 (landlord's bond in distress proceedings).

§ 89-7-67. Form of the writ.

The writ of attachment for rent and supplies, or either, may be in the following form, viz.:

"The State of Mississippi.

"To the sheriff or any constable of ________ County, greeting:

"Complaint on oath having been made before the undersigned, an acting justice of the peace in and for ________ County, that ________ is indebted to ________ for rent in arrear on the following leased premises [here describe the premises as in the affidavit], in the sum of ________ dollars, and that the said ________ is further indebted to ________ for supplies furnished the said ________, the tenant, by his landlord, in the sum of ________ dollars additional; and the claim having been made that there is a lien to secure the said debts on the following named agricultural products [here describe the products as in the affidavit], and bond having been given as required by law:

"Now, this is to command you that you forthwith seize and take the said agricultural products to an amount sufficient to satisfy the said debts, with interest and costs; and, if there be not a sufficiency of said products so to do, then that you distrain the other goods and chattels of the said ________, the tenant, so that your whole seizure may be sufficient to satisfy both of said sums, with interest and costs, and that you deal with the same as the law directs.

"Witness my hand, the ________ day of ________, A.D. ________

________________, J.P."

The above form must be varied so as to conform to the affidavit; and if a lien be not claimed, the command will be in these words:

"This is to command you to distrain the goods and chattels of the said ________, the tenant, to an amount sufficient to satisfy the said demands, with interest and costs, and that you deal with the same as the law directs."

SOURCES: Codes, 1892, § 2507; 1906, § 2844; Hemingway's 1917, § 2342; 1930, § 2194; 1942, § 916.

§ 89-7-69. Goods sold if not replevied.

The officer making a distress or seizure shall give notice thereof, with the cause of taking, to the tenant or his representative in person if to be found, or if not found, by leaving such notice at the dwelling house or other conspicuous place on the premises charged with the rent distrained for, and shall forthwith advertise the property distrained or seized for sale as if under execution; and if the tenant or owner of the goods distrained or seized shall not, before the time appointed for the sale, replevy the same by giving bond with sufficient sureties, to be approved by such officer, payable to the plaintiff in the attachment, in double the amount claimed, conditioned for the payment of the sum demanded, with lawful interest for the same, and costs, at the end of three (3) months after making such distress, the officer shall sell the goods and chattels distrained or seized at public sale to the highest bidder for cash, and shall, out of the proceeds of the sale, pay the costs of the proceedings, and shall pay to the plaintiff the amount of his demand, with interest.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(2); 1857, ch. 41, art. 2; 1871, § 1621; 1880, § 1303; 1892, § 2508; 1906, § 2845; Hemingway's 1917, § 2343; 1930, § 2195; 1942, § 917.

Cross References — Replevin of agricultural products or other distrained property, see § 89-7-89.

Trial of replevin suits, see §§ 89-7-107 et seq.

JUDICIAL DECISIONS

1. In general.

Failure to serve notice if tenant readily found, ground for quashing writ. Wright v. Craig, 92 Miss. 218, 45 So. 835 (1908).

Where party having right to quash comes in later and pleads, writ need not be quashed on remand after appeal. Wright v. Craig, 92 Miss. 218, 45 So. 835 (1908).

The attachment is in the nature of an execution for a money demand, and is not the beginning of a suit. Towns v. Boarman, 23 Miss. 186 (1851).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 616.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 137 (order authorizing sale of tenant's perishables distrained to secure payment of rent).

CJS. 52 C.J.S., Landlord and Tenant §§ 1297, 1298.

§ 89-7-71. Form of bond for payment of rent.

The bond to be taken by the officer for the payment of the rent and supplies, or either, in three (3) months, may be in the following form, viz.:

"The State of Mississippi,
County of ________

"We, ________, principal, and ________ and ________, sureties, bind ourselves to pay ________ the sum of ________ [here insert double the sum claimed] dollars, unless, on or before the ________ day of ________, A.D. ________, the said ________ shall pay to the said ________ the sum of ________ dollars, being for rent and supplies due him from the said ________, the tenant on the land in said county, being [here describe the leased premises as in the writ], together with interest thereon to said date, and the costs of the attachment for the same, levied on the property of said tenant, and now restored to him by virtue of this bond.

"Witness our signatures, this ________ day of ________, A.D. ________.

"________________,
"________________,
"________________."

"The foregoing bond is approved by me, this ________ day of ________, A.D. ________.

"________________, Sheriff."

If the attachment be for rent not due, the bond for the payment thereof will vary in its terms to suit the case.

SOURCES: Codes, 1892, § 2509; 1906, § 2846; Hemingway's 1917, § 2344; 1930, § 2196; 1942, § 918.

JUDICIAL DECISIONS

1. In general.

The obligor is estopped by the bond from denying that the rent is owing. Tooley v. Culbertson, 6 Miss. (5 Howard) 267 (1840); Robinson v. White, 15 Miss. (7 S. & M.) 39 (1846).

§ 89-7-73. Bond delivered to lessor, and proceedings thereon.

The bond taken for the payment of rent or supplies shall be forthwith delivered to the landlord for whom the distress was made; and if the money be not paid according to the condition, any court having jurisdiction of the amount thereof shall, on motion, award execution against the obligors therein, the bond being filed in the court, and five (5) days' notice given of the motion.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(3); 1857, ch. 41, art. 6; 1871, § 1625; 1880, § 1307; 1892, § 2510; 1906, § 2847; Hemingway's 1917, § 2345; 1930, § 2197; 1942, § 919.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

The proceeding by motion is a summary remedy, and must, therefore, conform to the statute in all material respects. Tifft v. Virden, 15 Miss. (7 S. & M.) 91 (1846).

The statute authorizing the judgment on motion is constitutional. Peck v. Critchlow, 8 Miss. (7 Howard) 243 (1843).

A bond made payable to the sheriff, and by him indorsed to the landlord, is valid. Tooley v. Culbertson, 6 Miss. (5 Howard) 267 (1840); Peck v. Critchlow, 8 Miss. (7 Howard) 243 (1843); Phillips v. Chaney, 8 Miss. (7 Howard) 250 (1843); Robinson v. White, 15 Miss. (7 S. & M.) 39 (1846).

§ 89-7-75. Remedy when claim not due in certain cases.

When any landlord or lessor shall have just cause to suspect, and shall verily believe, that his tenant will remove his agricultural products on which there is a lien, or any part thereof, from the leased premises to any other place before the expiration of his term, or before the rent or claim for supplies will fall due, or that he will remove his other effects, so that distress cannot be made, the landlord or lessor, in either case, on making oath thereof, and of the amount the tenant is to pay, and at what time the same will fall due, and giving bond, as required were the debt due, may, in like manner, obtain an attachment against the goods and chattels of such tenant; and the officer making the distress shall give notice thereof, and advertise the property distrained or seized for sale. If the tenant shall not, before the time appointed for sale, give bond, with sufficient sureties, in double the amount of the rent or other demand, payable to the plaintiff, conditioned for the payment of the sum due at the time it shall fall due, with costs, the goods distrained or seized, or so much thereof as may be necessary, shall be sold by the officer, at public sale, to the highest bidder, for cash, and out of the proceeds of the sale he shall pay the costs, and shall pay to the plaintiff the amount owing to him, deducting interest for the time until the same shall become due.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(7); 1857, ch. 42, art. 3; 1871, § 1622; 1880, § 1304; 1892, § 2511; 1906, § 2848; Hemingway's 1917, § 2346; 1930, § 2198; 1942, § 920.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

JUDICIAL DECISIONS

1. In general.

The landlord must do what the law exacts as the foundation for his attachment; otherwise, the tenant may successfully replevy, and that, too, though the truth would have justified the landlord in proceeding in the prescribed way. Dudley v. Harvey, 59 Miss. 34 (1881).

A mere belief that the tenant will remove effects other than agricultural products will not justify an attachment before the rent is due; The landlord must have "evidence of reasons and facts" upon which to base his belief. Briscoe v. McElween, 43 Miss. 556 (1870).

It is not every contemplated removal of effects on which there is no lien that will warrant an attachment; It must be a removal of such effects that would defeat a distress for rent. Stamps v. Gilman & Co., 43 Miss. 456 (1870).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 599.

16 Am. Jur. Pl & Pr Forms, (Rev), Landlord and Tenant, Form 138 (replevy bond by tenant to secure release of distrained personalty).

§ 89-7-77. Goods removed before debt due, distrained.

When any tenant shall have actually removed his effects, other than the agricultural products, upon which there is a lien, from the leased premises before the rent or demand for supplies has become due, so that there be no sufficient property liable to distress or seizure left on the premises, the landlord may in like manner obtain an attachment at any time after such removal or within thirty (30) days after such rent or other claim becomes due, and may levy the same on the effects so removed wherever they may be found and like proceedings shall be had thereon as in other cases. And if any tenant shall remove his agricultural products upon which there is a lien from the leased premises, the landlord may at any time have the same seized wherever they may be found, and like proceedings shall be had thereon as in other cases.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(8); 1857, ch. 41, art. 4; 1871, § 1623; 1880, § 1305; 1892, § 2512; 1906, § 2849; Hemingway's 1917, § 2347; 1930, § 2199; 1942, § 921.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

The attachment under this statute may be issued by a justice of the peace of a county other than the one where the leased premises are situated. Honea v. Page, 60 Miss. 248 (1882).

A landlord has no lien upon his tenant's goods other than agricultural products, and before distress for rent a bona fide purchaser of such goods, whether on or off the leased premises, will be protected. Honea v. Page, 60 Miss. 248 (1882).

RESEARCH REFERENCES

ALR. Valuation of corporate stock for purposes of succession, inheritance, or estate tax, as affected by quantity involved. 23 A.L.R.2d 775.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 615 et seq.

§ 89-7-79. Goods removed, seized within thirty days.

If any tenant shall at any time convey or carry off from the demised premises, his goods or chattels, leaving the rent, or any part thereof, or the sum owing for supplies, unpaid, the landlord or lessor, or his assigns, may, within thirty (30) days next after such conveying away or carrying off such goods or chattels, cause the same to be taken and seized wherever found, and the same to sell in like manner as if they had been distrained in or upon the demised premises. But goods or chattels, other than the agricultural products upon which there is a lien, so carried off and sold in good faith for a valuable consideration before seizure made, shall not be afterwards liable to be taken and seized for rent or supplies.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(12); 1857, ch. 41, art. 5; 1871, § 1624; 1880, § 1306; 1892, § 2513; 1906, § 2850; Hemingway's 1917, § 2348; 1930, § 2200; 1942, § 922.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

Claimant of trucks which were attached was required to show that they were bought in good faith for valuable consideration before levy was made. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Landlord had no lien upon trucks which he attached and which were sold by tenant to his wife prior to attachment. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Tenant's wife who showed deed of sale to her reciting valid consideration for tenant's trucks attached by landlord, having made prima facie case, landlord had burden to establish fraud or other defense. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Property removed from leased premises remains subject to landlord's lien for rent for thirty days after removal unless sold to bona fide purchaser before seizure. Durant Motor Co. v. Simpson, 160 Miss. 313, 133 So. 672 (1931).

A landlord has no lien upon his tenant's goods other than agricultural products, and before distress for rent a bona fide purchaser of such goods, whether on or off the premises, will be protected. Richardson v. McLaurin, 69 Miss. 70, 12 So. 264 (1891).

It is not necessary, to authorize the seizure under this statute, for the affidavit to aver the removal. Henry v. Davis, 60 Miss. 212 (1882).

§ 89-7-81. Distress may be made after termination of lease.

Any person, or his executor, administrator, or assigns having rent in arrear upon any lease for life, years, or otherwise, ended and determined, or a claim for supplies, may distrain for such arrears, after the termination of the lease, in the same manner as if the same had not been determined; but the distress must be made within six (6) months after the termination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears are due.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(14); 1857, ch. 41, art. 7; 1871, § 1626; 1880, § 1308; 1892, § 2514; 1906, § 2852; Hemingway's 1917, § 2350; 1930, § 2201; 1942, § 923.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

The property attached must be the property of the party against whom the writ is directed, or it must be liable for the rent due from him. Patty v. Bogle, 59 Miss. 491 (1882).

RESEARCH REFERENCES

ALR. Time for exercise of lessee's option to terminate lease. 37 A.L.R.2d 1173.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 613.

CJS. 52 C.J.S., Landlord and Tenant §§ 1280, 1315.

§ 89-7-83. Sale of goods stopped without bond.

If the tenant shall make affidavit, before the officer holding his property under an attachment for rent or supplies alleged to be due or to become due, that he does not or will not owe the amount claimed, such officer shall not sell the property, unless it be liable to perish or greatly depreciate, or be expensive to keep, in which case he shall sell it and hold the proceeds to the end of the suit; and he shall return the attachment with the affidavit and a statement of his proceedings to the proper court, and shall summon the party who sued out the attachment to appear there; and further proceedings shall be had as if the tenant had replevied the goods by giving bond.

SOURCES: Codes, 1880, § 1316; 1892, § 2528; 1906, § 2866; Hemingway's 1917, § 2364; 1930, § 2202; 1942, § 924.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 616.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 136 (motion by landlord for order authorizing sale of tenant's perishables distrained as security for rent).

CJS. 52 C.J.S., Landlord and Tenant § 1298.

§ 89-7-85. Distress to be reasonable, and property seized not to be removed from county.

It shall not be lawful for any officer who may execute an attachment for rent or supplies to remove the property distrained or seized out of the county where the distress or seizure was made; and if any officer or other person shall so remove any property distrained or seized, he shall pay to the party aggrieved double the value of the property removed, to be recovered in an action. And, moreover, distresses and seizures shall in all cases be reasonable and not too great; and any officer who shall make an unreasonable distress or seizure, under color of law, shall be liable to the party aggrieved for double damages.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5(23); 1857, ch. 41, art. 8; 1871, § 1627; 1880, § 1309; 1892, § 2515; 1906, § 2853; Hemingway's 1917, § 2351; 1930, § 2203; 1942, § 925.

Cross References — Tenant's remedy for wrongful distress, see § 89-7-115.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 593, 642.

CJS. 52 C.J.S., Landlord and Tenant § 1317-1321.

§ 89-7-87. Irregularities not to affect distress.

When any distress or seizure shall be made for rent or supplies justly due, and any irregularity or unlawful act shall afterwards be done by the officer distraining or seizing, the distress or seizure shall not, for that reason, be unlawful, nor the officer making or seizing it, or the party at whose instance the writ was issued, become a trespasser from the beginning, but the party aggrieved by such irregularity or unlawful act, may recover the special damage he may have sustained thereby. However, an action shall not be sustained if tender of amends be made by the party distraining before suit is brought.

SOURCES: Codes, 1880, § 1310; 1892, § 2516; 1906, § 2854; Hemingway's 1917, § 2352; 1930, § 2204; 1942, § 926.

JUDICIAL DECISIONS

1. In general.

The common-law right of a landlord to distrain is abrogated. Proceedings must be in accordance with the statute. There has been no relaxation of the strictness required in the observance of the law authorizing the procedure. The landlord must see that the affidavit, bond and writ conform to the law. Dudley v. Harvey, 59 Miss. 34 (1881).

§ 89-7-89. How goods replevied.

The tenant, his executor or administrator, may replevy the agricultural products or other property distrained, at any time before the sale thereof, by giving bond with one or more sufficient sureties, to be approved by the officer in whose custody the property may be, payable to the party in whose name or right the distress or seizure was made, in a penalty double the amount distrained for or double the value of the property seized, where the value is less than the amount distrained for, conditioned to prosecute his suit against the obligee in the bond for the property, and to perform the judgment of the court in such suit, in case he shall fail therein. Upon the delivery of such bond to the officer having control of the property, he shall deliver the same to the party giving the bond, and shall return the bond and the writ of attachment, with a statement of his proceedings, to the clerk of the circuit court if the value of the property or amount distrained for exceed Two Hundred Dollars ($200.00), and to the justice of the peace who issued the attachment if neither the amount claimed nor the value of the property exceed Two Hundred Dollars ($200.00); and he shall summon the party in whose name or right the distress or seizure was made, to appear at the next term of the court to which return of the attachment and bond shall be made, to answer the suit of the person replevying the property; and the officer shall make his return of having summoned such party on the papers by him returned to the court.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (15); 1857, ch. 41, art. 11; 1871, § 1630; 1880, § 1312; 1892, § 2518; 1906, § 2856; Hemingway's 1917, § 2354; 1930, § 2205; 1942, § 927.

Editor's Note — Pursuant to Miss. Const. Art. 6, Section 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

Cross References — Provision that the state shall have all the liens, rights, and remedies accorded to landlords in this chapter, see § 29-1-107.

JUDICIAL DECISIONS

1. In general.

Evidence sustained finding that new oral contract under which tenant was to pay what he could as reasonable rent for possession of land had replaced written contract, and verdict that landlord's attachment for rent was wrongfully sued out. Graham v. Swinney, 174 Miss. 579, 165 So. 438 (1936).

Defendant landlord without counter affidavit may disprove account sworn to with plaintiff tenant's declaration for property attached by landlord. Sprouse v. Davis, 141 Miss. 564, 106 So. 824 (1926).

Proceedings in attachment of agricultural products for rent becomes a suit for first time when tenant replevied property. Thornton v. Gardner, 134 Miss. 485, 99 So. 131 (1924).

The circuit court to which the return should be made is the circuit court of the county of which the justice of the peace who issued the attachment is an officer. Hauser v. Robbins, 61 Miss. 551 (1884).

This is true whether the property be found on the leased premises or not. Kendrick v. Watkins, 54 Miss. 495 (1877).

The ordinary action of replevin does not apply. Maxey v. White, 53 Miss. 80 (1876).

A separate suit cannot be maintained on the bond. It can by put in judgment in the replevin suit only. McKinney v. Green, 52 Miss. 70 (1876).

The replevin is the beginning of the suit. Towns v. Boarman, 23 Miss. 186 (1851).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 594.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 138 (replevy bond by tenant to secure release of distrained personalty).

CJS. 52 C.J.S., Landlord and Tenant, §§ 1317-1321.

§ 89-7-91. Summons or publication for party distraining.

In case of failure to summon in the first instance the party in whose name or right the distress was made, a summons may be issued for him by the clerk of the circuit court or justice of the peace; and if he cannot be found, publication may be made as in attachment cases.

SOURCES: Codes, 1880, § 1313; 1892, § 2520; 1906, § 2858; Hemingway's 1917, § 2356; 1930, § 2206; 1942, § 928.

Cross References — Publication of notice of attachment, see §§ 11-33-37 et seq.

§ 89-7-93. Form of replevin-bond.

The tenant's replevin-bond, or that of a claimant, may be in the following form, viz.:

"We, ________, principal, and ________ and ________, sureties, bind ourselves to pay ________ the sum of ________ dollars [double the value of the goods and chattels, if that be less than the rent claimed], unless the said ________ shall prosecute his suit against the said ________ for certain goods and chattels, to wit: Eight bales of cotton [or whatever is distrained], distrained for rent [or supplies, or both, as the case may be] by virtue of an attachment in favor of ________ against ________, issued by ________, a justice of the peace of ________ County, and now here restored to the said ________, and shall perform the judgment of the court in such suit in case he shall fail therein.

"Witness our hands, the ________ day of ________, A.D. ________.

"________________,
"________________,
"________________."

"I approve the foregoing bond, this ________ day of ________, A.D. ________.

"________________"

SOURCES: Codes, 1880, § 1353; 1892, § 2519; 1906, § 2857; Hemingway's 1917, § 2355; 1930, § 2207; 1942, § 929.

RESEARCH REFERENCES

Am Jur. 16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 138 (replevy bond by tenant to secure release of distrained personalty).

§ 89-7-95. Party replevying to propound claim.

By the first day of the next term of the court to which such replevy-bond and attachment shall have been returned, or afterwards, if longer time be granted by the court, the party who replevied the property shall file either a motion to quash the attachment proceedings or his declaration in replevin, if in the circuit court, or appear and prosecute his claim, if in a justice's court, against the party in whose name or right the distress or seizure was made. Such party shall make defense, and if the attachment proceeding be quashed it may be amended. A tenant may file his declaration after a motion to quash shall have been denied, and the cause shall proceed to an issue and trial; and if upon trial it be found that the sum for rent or supplies was due, in whole or part, and that the distress was lawfully made, the landlord shall have judgment against the obligors in the replevy-bond for a return of the property replevied, or its value, to an amount sufficient to pay the sum found due, with interest and costs of suit. If the property replevied be restored, it shall be sold to satisfy the judgment, and if it be not sufficient, execution shall go against the party replevying for the residue.

SOURCES: Codes, 1880, § 1314; 1892, § 2521; 1906, § 2859; Hemingway's 1917, § 2357; 1930, § 2208; 1942, § 930.

JUDICIAL DECISIONS

1. In general.

That tenant bringing replevin for farm products seized under distress for rent failed to plead Sunday statute, held not reversible error, where landlord made no objection to evidence lease was executed on Sunday. Stamps v. Frost, 174 Miss. 325, 164 So. 584 (1935).

Error to disallow amendment of affidavit for attachment; writ having been quashed. McSwain v. Cephus, 109 Miss. 368, 69 So. 178 (1915).

By virtue of this section [Code 1942, § 930] the proceedings in a landlord's attachment for rent or supplies may be amended. Schlicht v. Callicott, 76 Miss. 487, 24 So. 869 (1899).

In replevin by a tenant, where there is a controversy as to the amount of rent due, a general verdict for the landlord, without finding the sum due as required by this section, is insufficient, and the jury having dispersed, the case must be treated as if a mistrial had occurred. Gilleylen v. Stewart, 72 Miss. 262, 16 So. 495 (1895).

§ 89-7-97. Form of declaration.

The declaration in replevin in such case may be substantially in the following form, to wit:

"State of Mississippi.

Circuit court, ________ term, A.D. ________

County of ________

"Thomas East, the plaintiff in this case, complains of William West, the defendant, in an action of replevin.

"For that heretofore, to wit: on the ________ day of ________, A.D. ________, the said defendant wrongfully caused an officer of ________ County to seize and take from the plaintiff's possession, under an attachment for rent [or rent and supplies, or for supplies, as the case may be], certain personal property of the plaintiff's, to wit: here describe the property and give the value of each separate item of it.

"And the plaintiff avers that he is entitled to recover the same and also to recover of defendant the sum of ________ dollars damages for the said wrongful taking; wherefore, he sues and demands judgment accordingly, and costs of suit."

SOURCES: Codes, 1892, § 2522; 1906, § 2860; Hemingway's 1917, § 2358; 1930, § 2209; 1942, § 931.

JUDICIAL DECISIONS

1. In general.

Evidence sustained finding tenant's oral contract had replaced written contract, and that landlord's attachment for rent was wrongfully sued out. Graham v. Swinney, 174 Miss. 579, 165 So. 438 (1936).

That tenants bringing replevin for farm products seized under distress for rent failed to plead Sunday statute held not reversible error, where landlord made no objection to evidence that lease was executed on Sunday. Stamps v. Frost, 174 Miss. 325, 164 So. 584 (1935).

Judgment for lessee against lessor for amount by which total of sums agreed to be deducted from monthly rent and paid lessor's creditor by lessee exceeded rent for period before partial destruction of leased mill by fire will not be affirmed on remittitur of amount exceeding sums deductible for such period only, but must be reversed and cause remanded for entry of judgment in proper amount. Moore-Curry Lumber Co. v. Wogan, 170 Miss. 512, 155 So. 329 (1934).

Person incurring attorney's fees in bringing suit for damages for attachment for rent is entitled to recover therefor. Wigginton v. Moore, 147 Miss. 169, 113 So. 326 (1927).

§ 89-7-99. Pleas to the declaration.

The only pleas to a declaration in replevin shall be either, first, a denial that the goods were seized on demand or at the plaint of the defendant; or, second, an avowry that they were rightfully seized for rent or supplies, or both, due and in arrear, or to become due. The two pleas can only be pleaded together when each is to only a part of the declaration and relates to separate portions of the property. The first of said pleas shall be substantially to the following effect, to wit:

"Thomas East
v. Circuit court, ______ County.
William West.

"Now comes the defendant, William West, and for plea to plaintiff's declaration, says: It is not true that he caused an officer of ______ County to seize and take from plaintiff, Thomas East, under an attachment for rent, the possession of the property, or any part of it, described in the said declaration; and of this the defendant puts himself upon the country."

On the trial of this plea the burden of proof shall be on the plaintiff .

SOURCES: Codes, 1892, § 2523; 1906, § 2861; Hemingway's 1917, § 2359; 1930, § 2210; 1942, § 932.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 617.

§ 89-7-101. The avowry.

The avowry shall be substantially to the following effect, to wit:

"Thomas East
v. Circuit court, ________ County.
William West.

"And now comes the defendant, William West, and for plea to plaintiff's declaration he says: True it is that he caused the property described in the plaintiff's declaration to be seized; but the seizure was not wrongful, because he says that before the said seizure defendant was the plaintiff's landlord; that he, the defendant, as landlord, leased to the plaintiff, as tenant, certain premises in said county, to wit: [here describe the leased premises] for the term beginning on the ________ day of ________, A.D. ________, and ending on the ________ day of ________, A.D. ________; that at the time of the said seizure the plaintiff, as tenant, was indebted to defendant, as landlord, in the sum of ________ dollars, for rent of said premises and for supplies furnished his said tenant by this defendant [or for rent alone or supplies alone, as the case may be]. An itemized account or statement of said indebtedness is herewith filed [or the note or writing evidencing said debt, as the case may be], and the said debt became due on the ________ day of ________, A.D. ________, and the said seizure was made to satisfy the sum so due; and this the defendant is ready to verify."

If the avowry be for a sum to become due, strike out from the form all after the last parenthesis, and insert in lieu thereof the following, viz.: "Which said indebtedness will become due on the ________ day of ________, A.D. ________, and defendant had just cause to suspect, and verily believed, that the plaintiff would remove his effects, or some part of the agricultural products raised thereon, from the leased premises before the expiration of his term, or before the said debt would become due, so that distress could not be made, and the said seizure was made to satisfy the said sum. This the defendant is ready to verify."

SOURCES: Codes, 1892, § 2524; 1906, § 2862; Hemingway's 1917, § 2360; 1930, § 2211; 1942, § 933.

JUDICIAL DECISIONS

1. In general.

Evidence sustained finding tenant's oral contract had replaced written contract, and that landlord's attachment for rent was wrongfully sued out. Graham v. Swinney, 174 Miss. 579, 165 So. 438 (1936).

It is error to enter judgment by default in replevin without disposing of avowry filed. Barlow v. Serio, 129 Miss. 875, 93 So. 356 (1922).

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant § 617.

§ 89-7-103. The replication.

If the avowry be for rent and supplies, or either, claimed to be due and in arrears, the replication by the plaintiff shall be substantially in the following form, viz.:

"Thomas East
v. Circuit court, ______ County.
William West.

"And the plaintiff, for replication, says he was not indebted to the defendant as stated in his said avowry; and of this the plaintiff puts himself upon the country."

SOURCES: Codes, 1892, § 2525; 1906, § 2863; Hemingway's 1917, § 2361; 1930, § 2212; 1942, § 934.

JUDICIAL DECISIONS

1. In general.

Where claimant replevies property attached for rent, his replication to landlord's avowry should not literally follow form given in this section [Code 1942, § 934] and deny indebtedness; but issue of ownership should be presented and evidence thereon admitted. Wright v. Craig, 92 Miss. 218, 45 So. 835 (1908).

§ 89-7-105. Replication in case rent not due.

If the avowry be a claim for rent or supplies, or both, to become due, the plaintiff shall reply either that he was not indebted, as in the form last above, or he may reply in substance as in the following form, viz.:

"Thomas East
v. Circuit court, ______ County.
William West.

"And the plaintiff, for replication, says that the defendant did not have just cause to suspect and verily believe that the plaintiff would remove his effects, or some part of the agricultural products raised thereon, from the leased premises before the expiration of his term or before the said debt would become due, so that distress could not be made; and of this plaintiff puts himself upon the country."

The plaintiff may, in proper case, unite the said replications, or he may reply any other facts constituting a legal answer.

And on the trial of an issue on an avowry, the burden of proof shall be on the avowant, the landlord, and he shall have the right to open and conclude the argument.

SOURCES: Codes, 1892, § 2526; 1906, § 2864; Hemingway's 1917, § 2362; 1930, § 2213; 1942, § 935.

JUDICIAL DECISIONS

1. In general.

Tenant replevying goods attached by landlord for supplies furnished, failing to allege that crop for which supplies furnished was not grown on leased land, could not object that landlord's evidence did not show where crop grown. McRae v. Browning, 119 Miss. 427, 81 So. 123 (1919).

If issue tendered denying allegation of avowry, burden is on landlord or avowant; if relation of landlord and tenant, amount of contract, or amount of supplies furnished is denied, landlord must prove contention, but if admitted no issue is made on avowry; if plaintiff undertake to confess and avoid by affirmative plea setting up new matter, and issue is tendered thereon, burden shifts and plaintiffs assuming it have right to open and close. McNeer & Dodd v. Norfleet, 113 Miss. 611, 74 So. 577, Am. Ann. Cas. 1918E,436 (1917).

§ 89-7-107. Replevin; when triable, and judgment upon default.

Suits by the tenant or a third person replevying the property, shall be triable at the first term of the court; and in either case, if the party replevying shall make default or fail to prosecute his suit, like judgment shall be entered against him and the sureties on the bond as upon an issue found against him on trial, and a new replevin or writ of second deliverance shall not be allowed.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (17); 1857, ch. 41, art. 13; 1871, § 1632; 1880, § 1320; 1892, § 2535; 1906, § 2873; Hemingway's 1917, § 2371; 1930, § 2214; 1942, § 936.

JUDICIAL DECISIONS

1. In general.

The landlord, as against a claimant as well as against the tenant, must avow and prove the rent due, etc. Lavigne v. Russ, 36 Miss. 326 (1858); Maxey v. White, 53 Miss. 80 (1876).

The tenant or claimant is the plaintiff, and must prosecute the suit. Parkhurst v. Dunlap, 7 Miss. (6 Howard) 577 (1842).

§ 89-7-109. Suit revived in case of death of party.

If either party to such replevin or other action growing out of an attachment for rent or supplies, die pending the same, the suit may be revived for or against the representatives of the deceased party as other actions that survive may be revived.

SOURCES: Codes, 1857, ch. 41, art. 25; 1871, § 1644; 1880, § 1321; 1892, § 2536; 1906, § 2874; Hemingway's 1917, § 2372; 1930, § 2215; 1942, § 937.

Cross References — Survival of actions generally, see §§ 91-7-233 et seq.

§ 89-7-111. Judgment if trial results against lessor.

If the trial of suit result in favor of the party replevying the property, the judgment shall be that he retain it, and recover of the party in whose name or right such distress was sued out damages for the wrongful suing out of the attachment. Thereupon scire facias may be issued to the sureties on the attachment-bond to appear at the next term of the court to show cause against a judgment being given against them for the amount of the judgment for damages against their principal, not to exceed the penalty of their bond; and if cause be not affirmatively shown, judgment shall be rendered against them.

SOURCES: Codes, 1880, § 1315; 1892, § 2527; 1906, § 2864; Hemingway's 1917, § 2363; 1930, § 2216; 1942, § 938.

JUDICIAL DECISIONS

1. In general.

Tenant's wife who sought to replevy trucks wrongfully attached by landlord was entitled to reasonable attorney's fees, if prevailing. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Stranger claimant is entitled to reasonable damages for wrongful attachment under same circumstances as tenant is entitled under statute. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

The tenant is confined to the remedy provided in the section [Code 1942, § 938], except where rent is falsely claimed when nothing was due. Kyzer v. Middleton, 61 Miss. 360 (1883).

§ 89-7-113. Papers transferred, if returned to wrong court.

If the papers, in case of a replevin of property, be returned to the wrong court, they shall be transferred to the proper court, and the case be there proceeded with as if they had been returned to that court in the first instance.

SOURCES: Codes, 1880, § 1319; 1892, § 2534; 1906, § 2872; Hemingway's 1917, § 2370; 1930, § 2217; 1942, § 939.

§ 89-7-115. Tenant's remedy against landlord.

If any distress or seizure and sale be made under color of law for rent or supplies pretended to be due and in arrear, where, in truth, no rent or sum for supplies is due or owing to the party causing the distress or seizure to be made, then the owner of the agricultural products or other property so taken and sold, his executor or administrator, shall have remedy by action against the person in whose name or right such property was taken, his executor or administrator, and shall recover double the value of the property, with costs, or may put the bond of the plaintiff in suit to recover damages for the wrongful suing out of the writ, and shall recover therein double the value of the property, if the penalty of the bond amount to so much.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (5); 1857, ch. 41, art. 10; 1871, § 1629; 1880, § 1311; 1892, § 2517; 1906, § 2855; Hemingway's 1917, § 2353; 1930, § 2218; 1942, § 940.

Cross References — Rights, obligations and remedies available under Sections 89-7-1 through 89-7-125 not altered or abridged by rights, obligations and remedies available under Chapter 8 of Title 89, see § 89-8-3.

JUDICIAL DECISIONS

1. In general.

Proper elements of damages for wrongful suing out injunction to prevent tenant from removing building are attorney's fees, costs, expenses of trial, depreciation, and reasonable rental value. Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926).

This section [Code 1942, § 940] applies only where property sold under attachment and seizure and not where replevied by tenant. Thornton v. Gardner, 134 Miss. 485, 99 So. 131 (1924).

Tenant replevying goods attached by landlord for supplies furnished, failing to allege that crops for which supplies furnished not grown on leased land, could not object that landlord's evidence did not show where crop grown. McRae v. Browning, 119 Miss. 427, 81 So. 123 (1919).

Tenant may recover on the attachment bond for the actual damages sustained. Hawkins v. James, 69 Miss. 361, 11 So. 654 (1892).

A tenant cannot recover double damages for an alleged wrongful distress by the landlord if the attachment proceedings, though based upon an affidavit and bond, appropriate to a distress, proceed thereafter as an ordinary attachment against the debtor, and were so treated by both parties. Hawkins v. James, 69 Miss. 361, 11 So. 654 (1892).

It is only where the landlord falsely pretends that something is due that the tenant can recover the double damages. Kyzer v. Middleton, 61 Miss. 360 (1883).

There is no privity of contract between the lessor and the assignee of the term from the lessee; and the property of such assignee cannot be taken if the attachment be sued out against him by the lessor. Patty v. Bogle, 59 Miss. 491 (1882).

RESEARCH REFERENCES

ALR. Landlord and tenant: respective rights in excess rent when landlord relets at higher rent during lessee's term. 50 A.L.R.4th 403.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 593, 642.

32 Am. Jur. Proof of Facts 2d 659, Landlord's Conversion of Tenant's Property.

42 Am. Jur. Proof of Facts 2d 317, Constructive Eviction by Conduct of Other Tenant.

46 Am. Jur. Proof of Facts 2d 429, Intentional Infliction of Emotional Distress by Landlord.

50 Am. Jur. Proof of Facts 2d 519, Lessee's Excusable Failure to give Timely Notice Exercising Option to Renew Lease.

3 Am. Jur. Proof of Facts 3d 581, Sexual Harassment by Landlord.

CJS. 52 C.J.S., Landlord and Tenant §§ 1317-1321.

§ 89-7-117. Property of strangers not liable.

Property, except agricultural products on which there is a lien for rent, found or being on any demised premises, not belonging to the tenant or to some person bound or liable for the rent of such premises, shall not be liable to be distrained for rent; but if the tenant or other person liable for the rent have a limited interest in the property, the same may be distrained, and the interest therein of the tenant or person liable for the rent may be sold.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (10); 1857, ch. 41, art. 12; 1871, § 1631; 1880, § 1317; 1892, § 2529; 1906, § 2867; Hemingway's 1917, § 2365; 1930, § 2219; 1942, § 941.

Cross References — Trial of right to property levied upon, see §§ 11-23-7 et seq.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 607 et seq.

32 Am. Jur. Proof of Facts 2d 659, Landlord's Conversion of Tenant's Property.

§ 89-7-119. Replevin of property by strangers.

When any person other than the tenant shall claim to be the owner of any property distrained or seized for rent or supplies, he may make affidavit that said property is his, and not the property of the tenant, and not held to the use of the tenant in any manner whatever, and is not liable to such distress or seizure. If he desire immediate possession of said property, he shall give bond, with sufficient sureties, in the manner directed for the tenant, and such affidavit and bond shall be delivered to the officer who made the distress, who shall deliver the property to the claimant. Such claim may be interposed without giving bond, and the same proceedings shall be had thereon, except that the property claimed shall not be delivered to the claimant, but shall be disposed of as in the case of replevy by the tenant. Upon such claim being made, the landlord may release the property so claimed and forthwith distrain or seize other property in lieu thereof.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 5 (10, 16); 1857, ch. 41, art. 12; 1871, § 1631; 1880, § 1317; 1892, § 2530; 1906, § 2868; Hemingway's 1917, § 2366; 1930, § 2220; 1942, § 942.

Cross References — Trial of right to property levied upon, see §§ 11-23-7 et seq.

JUDICIAL DECISIONS

1. In general.

Stranger claimant is entitled to reasonable damages for wrongful attachment under same circumstances as tenant, under statute. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

Burden of proving ownership on party filing affidavit for property attached by landlord; prima facie case made out by proof of ownership, and burden shifts to landlord to show that it is subject to lien for rent. Dunn v. Hart, 120 Miss. 132, 81 So. 795 (1919).

Third party owning property on leased premises, distrained for rent, may recover by remedy provided in this section [Code 1942, § 942] or by any other remedy known to law, as by replevin. Shuler v. L. Grunewald Co., 113 Miss. 763, 74 So. 659 (1917).

A claimant of goods attached for rent is to be treated in the interposition of his claim as a plaintiff in replevin and must give attention to the prosecution of the suit without notification thereunto. Pierce v. Watkins, 74 Miss. 394, 21 So. 148 (1896).

Where property levied upon under attachment for rent is claimed by a third person who files an affidavit without giving bond, the officer has no authority to sell it pending the suit unless the same consists of "live stock or chattels, which it is expensive to keep, or perishable articles." Weis v. Basket, 71 Miss. 771, 15 So. 659 (1894).

Cotton ginned and in bales is not of the class that may be sold. Weis v. Basket, 71 Miss. 771, 15 So. 659 (1894).

RESEARCH REFERENCES

Am Jur. 32 Am. Jur. Proof of Facts 2d 659, Landlord's Conversion of Tenant's Property.

§ 89-7-121. Form of affidavit by third person.

The affidavit by a third person claiming property distrained or seized for rent or supplies may be in the following form, to wit:

"State of Mississippi,
________ County.

"Before me, ________, a justice of the peace of the said county, ________ makes oath that certain property to wit: eight bales of cotton [or whatever the property may be], distrained for rent by ________, a constable of said county, by virtue of an attachment for rent in favor of ________ against ________, are the property of affiant and not the property of ________, nor held in trust for his use, in any manner whatsoever; and are not liable to such distress.

"Sworn to and subscribed before me, the ________ day of ________, A.D.

"________________, J.P."

SOURCES: Codes, 1892, § 2532; 1906, § 2870; Hemingway's 1917, § 2368; 1930, § 2221; 1942, § 943.

§ 89-7-123. Proceedings to be as in replevin by tenant.

The affidavit may be made before the officer having the property, and he shall make return of it and of the bond, if any, and the attachment papers, and summon the other party, as required in case of a replevin by the tenant; and the claimant replevying the property shall prosecute his suit against the party in whose name or right it was attached, in all respects as the tenant is required to do; and the pleadings and proceedings shall be conformed so as to present the proper issues.

SOURCES: Codes, 1857, ch. 41, art. 12; 1871, § 1631; 1880, § 1318; 1892, § 2533; 1906, § 2871; Hemingway's 1917, § 2360; 1930, § 2222; 1942, § 944.

JUDICIAL DECISIONS

1. In general.

Stranger claimant is entitled to reasonable damages for wrongful attachment under same circumstances as tenant, under statute. Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).

§ 89-7-125. Burden of proof.

On the trial of the issue between the landlord and such claimant, the burden of proof to show ownership in the property shall be on the claimant.

SOURCES: Codes, 1892, § 2531; 1906, § 2869; Hemingway's 1917, § 2367; 1930, § 2223; 1942, § 945.

JUDICIAL DECISIONS

1. In general.

Burden of proving ownership on party filing affidavit under Code 1906, § 2868 [Code 1942, § 942]; prima facie case made out by proof of ownership, and burden shifts to landlord to prove property subject to lien. Dunn v. Hart, 120 Miss. 132, 81 So. 795 (1919).

CHAPTER 8

Residential Landlord and Tenant Act

Sec.

89-8-1. Short title.
89-8-3. Application of chapter.
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89-8-27. Housing authorities authorized to contract with tenant management organizations; authority to sell public housing units to tenant management organizations.
89-8-29. Derrick Beard Act; termination of lease of residential premises by cosigner upon death of lessee; presumption of termination; cosigner's choice not to terminate; effect of termination on certain liabilities of lessee's estate or cosigner; applicability of section.

§ 89-8-1. Short title.

This chapter shall be known and may be cited as the "Residential Landlord and Tenant Act."

SOURCES: Laws, 1991, ch. 478, § 1, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

RESEARCH REFERENCES

Law Reviews. Bell, The Mississippi Landlord-Tenant Act of 1991. 61 Miss. L. J. 527, Winter, 1991.

§ 89-8-3. Application of chapter.

(1) This chapter shall apply to, regulate and determine rights, obligations and remedies under any rental agreement entered into after July 1, 1991, wherever made, for a dwelling unit located within this state. The rights, obligations and remedies of this chapter shall be in addition to all other rights, obligations and remedies provided by law and shall not alter or abridge the

rights, obligations and remedies available to residential landlords and tenants pursuant to Sections 89-7-1 through 89-7-125.

(2) The following arrangements are not governed by this chapter:

(a) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious or similar service;

(b) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;

(c) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(d) Transient occupancy in a hotel, motel or lodgings;

(e) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative; or

(f) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes or when the occupant is performing agricultural labor for the owner and such premises are rented for less than fair rental value.

SOURCES: Laws, 1991, ch. 478, § 2; Laws, 1993, ch. 312, § 1, eff from and after passage (approved March 12, 1993).

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

§ 89-8-5. Waiver of rights prohibited; provisions prohibited in rental agreement.

In any agreement, oral or written, for the rental of real property as a dwelling place, a landlord or tenant may not agree to waive or otherwise forego any of the rights, duties or remedies under this chapter, except as otherwise provided by this chapter. No rental agreement may provide that the tenant or the landlord:

(a) Authorizes any person to confess judgment on a claim arising out of the rental agreement; or

(b) Agrees to the exculpation or limitation of any liability of the landlord arising as a result of the landlord's willful misconduct or the costs connected therewith.

SOURCES: Laws, 1991, ch. 478, § 3, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Right of landlord and tenant to agree that tenant perform duties of landlord, subject to the provisions of this section, see § 89-8-23.

RESEARCH REFERENCES

ALR. Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 A.L.R.3d 786.

Validity of exculpatory clause in lease exempting lessor from liability. 49 A.L.R.3d 321.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 11-42.

CJS. 51C C.J.S., Landlord and Tenant §§ 184-251.

§ 89-8-7. Definitions; agent of landlord.

(1) Subject to additional definitions contained in subsequent sections of this chapter which apply to specific sections or parts thereof, and unless the context otherwise requires, in this chapter:

(a) "Building and housing codes" includes any law, ordinance, or governmental regulation concerning fitness for habitation, construction, maintenance, operation, occupancy or use of any premises or dwelling unit;

(b) "Dwelling unit" means a structure or the part of a structure that is used as a home, residence or sleeping place by one (1) person who maintains a household or by two (2) or more persons who maintain a common household;

(c) "Good faith" means honesty in fact in the conduct of the transaction concerned and observation of reasonable community standards of fair dealing;

(d) "Landlord" means the owner, lessor or sublessor of the dwelling unit or the building of which it is a part, or the agent representing such owner, lessor or sublessor;

(e) "Organization" includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, and any other legal or commercial entity;

(f) "Owner" means one or more persons, jointly or severally, in whom is vested (i) all or part of the legal title to property or (ii) all or part of the beneficial ownership and a right to present use and enjoyment of the premises, and the term includes a mortgagee in possession;

(g) "Premises" means a dwelling unit and the structure of which it is a part, facilities and appurtenances therein, and grounds, areas and facilities held out for the use of tenants generally or whose use is promised to the tenant;

(h) "Rent" means all payments to be made to the landlord under the rental agreement;

(i) "Rental agreement" means all agreements, written or oral, and valid rules and regulations adopted under Section 89-8-11 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises;

(j) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others;

(k) "Qualified tenant management organizations" means any organization incorporated under the Mississippi Nonprofit Corporation Act, a majority of the directors of which are tenants of the housing project to be managed under a contract authorized by this section and which is able to conform to standards set by the United States Department of Housing and Urban Development as capable of satisfactorily performing the operational and management functions delegated to it by the contract.

(2) For purposes of giving any notice required under this chapter, notice given to the agent of the landlord is equivalent to giving notice to the landlord. The landlord may contract with an agent to assume all the rights and duties of the landlord under this chapter; provided, however, that such a contract does not relieve the landlord of ultimate liability in regard to such rights and duties.

SOURCES: Laws, 1991, ch. 478, § 4, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Mississippi Nonprofit Corporation Act, see § 79-11-101 et seq.

§ 89-8-9. Obligation to act in good faith.

Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter, including the landlord's termination of a tenancy or nonrenewal of a lease, imposes an obligation of good faith in its performance or enforcement.

SOURCES: Laws, 1991, ch. 478, § 5, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

§ 89-8-11. Rules and regulations of landlord concerning tenant's use and occupancy of premises.

(1) A landlord may, from time to time, adopt rules or regulations, however described, concerning the tenant's use and occupancy of the premises. They are enforceable against the tenant only if:

(a) Their purpose is to promote the convenience, safety or welfare of the tenants in the premises, preserve the landlord's property from abuse, or make a fair distribution of services and facilities provided for the tenants generally;

(b) They are reasonably related to the purpose for which they are adopted;

(c) They apply to all tenants in the premises in a fair manner;

(d) They are sufficiently explicit in their prohibition, direction or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(e) They are not for the purpose of evading the obligations of the landlord.

(2) A rule or regulation adopted or amended after the tenant enters into the rental agreement is enforceable against the tenant if reasonable notice of its adoption or amendment is given to the tenant and it does not work a substantial modification of the rental agreement.

(3) If the dwelling unit is an apartment in a horizontal property regime, the tenant shall comply with the bylaws of the association of the apartment owners; and if the dwelling unit is an apartment in a cooperative housing corporation, the tenant shall comply with the bylaws of the corporation.

(4) Unless otherwise agreed, the tenant shall occupy his dwelling unit only as a dwelling unit.

SOURCES: Laws, 1991, ch. 478, § 6, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Definition of "rental agreement" as including all rules and regulations adopted under this section, see § 89-8-7.

RESEARCH REFERENCES

ALR. Validity of exculpatory clause in lease exempting lessor from liability. 49 A.L.R.3d 321.

Express or implied restriction on lessee's use of residential property for business purposes. 46 A.L.R.4th 496.

Provision in lease as to purpose for which premises are to be used as excluding other uses. 86 A.L.R.4th 259.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 11-42.

CJS. 51C C.J.S., Landlord and Tenant §§ 184-251.

§ 89-8-13. Right to terminate tenancy for breach; notice of breach; return of prepaid rent and security.

(1) If there is a material noncompliance by the tenant with the rental agreement or the obligations imposed by Section 89-8-25, the landlord may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by this chapter.

(2) If there is a material noncompliance by the landlord with the rental agreement or the obligations imposed by Section 89-8-23, the tenant may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by this chapter.

(3) The nonbreaching party may deliver a written notice to the party in breach specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty (30) days after receipt of the notice if the breach is not remedied within a reasonable time not in excess of thirty (30) days; and the rental agreement shall terminate and the

tenant shall surrender possession as provided in the notice subject to the following:

(a) If the breach is remediable by repairs, the payment of damages, or otherwise, and the breaching party adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate;

(b) In the absence of a showing of due care by the breaching party, if substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the nonbreaching party may terminate the rental agreement upon at least fourteen (14) days' written notice specifying the breach and the date of termination of the rental agreement;

(c) Neither party may terminate for a condition caused by his own deliberate or negligent act or omission or that of a member of his family or other person on the premises with his consent.

(4) If the rental agreement is terminated, the landlord shall return all prepaid and unearned rent and security recoverable by the tenant under Section 89-8-21.

(5) Notwithstanding the provisions of this section or any other provisions of this chapter to the contrary, if the material noncompliance by the tenant is the nonpayment of rent pursuant to the rental agreement, the landlord shall not be required to deliver thirty (30) days' written notice as provided by subsection (3) of this section. In such event, the landlord may seek removal of the tenant from the premises in the manner and with the notice prescribed by Chapter 7, Title 89, Mississippi Code of 1972.

SOURCES: Laws, 1991, ch. 478, § 7; Laws, 1993, ch. 312, § 2, eff from and after passage (approved March 12, 1993).

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Rights of landlord after expiration of rental agreement notwithstanding the provisions of this section, see § 89-8-17.

ATTORNEY GENERAL OPINIONS

Party who has been given 30 day notice of first breach has 30 days within which to remedy breach and to thereby prevent rental agreement from terminating; statute provides no such right to remedy or cure second, similar breach after 14 day notice has been given. Alexander, Nov. 12, 1992, A.G. Op. #92-0857.

RESEARCH REFERENCES

ALR. Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction. 86 A.L.R.3d 352.

Waiver of statutory demand-for-rent due or notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent-modern cases. 31 A.L.R.4th 1254.

Express or implied restriction on lessee's use of residential property for business purposes. 46 A.L.R.4th 496.

Provision in lease as to purpose for which premises are to be used as excluding other uses. 86 A.L.R.4th 259.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 246, 825-861.

16 Am. Jur. Pl and Pr Forms (Rev), Landlord and Tenant, Forms 171-182.

CJS. 51C C.J.S., Landlord and Tenant §§ 102-119.

§ 89-8-15. Repair of defects by tenant.

(1) If, within thirty (30) days after written notice to the landlord of a specific and material defect which constitutes a breach of the terms of the rental agreement or of the obligation of the landlord under Section 89-8-23, the landlord fails to repair such defect, the tenant:

(a) May repair such defect himself; and

(b) Except as otherwise provided in subsection (2) of this section, shall be entitled to reimbursement of the expenses of such repairs within forty-five (45) days after submission to the landlord of receipted bills for such work, provided that:

(i) The tenant has fulfilled his affirmative obligations under Section 89-8-25;

(ii) The expenses incurred in making such repairs do not exceed an amount equal to one (1) month's rent;

(iii) The tenant has not exercised the remedy provided by this section in the six (6) months immediately preceding; and

(iv) The tenant is current in his rental payment.

(2) A tenant shall not be entitled to be reimbursed for repairs made pursuant to this section in an amount greater than the usual and customary charge for such repairs.

(3) Before correcting a condition affecting facilities shared by more than one (1) dwelling unit, the tenant shall notify all other tenants sharing such facilities of his plans and shall so arrange the work as to create the least practicable inconvenience to the other tenants.

(4) The cost of repairs made by a tenant pursuant to this section may be offset against future rent.

(5) No provision of this section shall be construed to grant a lien against the real property.

SOURCES: Laws, 1991, ch. 478, § 8, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

RESEARCH REFERENCES

ALR. Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 A.L.R.3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 A.L.R.3d 521.

Tenant's right, where landlord fails to make repairs, to have them made and set off cost against rent. 40 A.L.R.3d 1369.

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction. 86 A.L.R.3d 352.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 631, 710-717, 794.

CJS. 51C C.J.S., Landlord and Tenant §§ 372, 373, 387-401.

Law Reviews. Note: Developing a housing plan for Mississippi: some program and funding alternatives. 61 Miss. L. J. 605, Winter, 1991.

§ 89-8-17. Rights of landlord after expiration of rental agreement.

Notwithstanding the provisions of Section 89-8-13, the landlord may, at any time after the expiration of a rental agreement, recover possession of the dwelling unit, cause the tenant to quit the dwelling unit involuntarily, demand an increase in rent or decrease the services to which the tenant has been entitled in accordance with any other provisions of this chapter, if such actions by the landlord did not have the dominant purpose of retaliation against the tenant for his actions authorized under this chapter and the landlord received written notice of each condition which was the subject of such actions of the tenant.

SOURCES: Laws, 1991, ch. 478, § 9, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

RESEARCH REFERENCES

ALR. Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 A.L.R.3d 177.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 825-861.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Forms 41-52.

CJS. 51C C.J.S., Landlord and Tenant §§ 89-101.

§ 89-8-19. Length of term of tenancy; notice to terminate tenancy; exception to notice requirement.

(1) Unless the rental agreement fixes a definite term a tenancy shall be week to week in case of a tenant who pays weekly rent, and in all other cases month to month.

(2) The landlord or the tenant may terminate a week-to-week tenancy by written notice given to the other at least seven (7) days prior to the termination date.

(3) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty (30) days prior to the termination date.

(4) Notwithstanding the provisions of this section or any other provision of this chapter to the contrary, notice to terminate a tenancy shall not be required to be given when the landlord or tenant has committed a substantial violation of the rental agreement or this chapter that materially affects health and safety.

SOURCES: Laws, 1991, ch. 478, § 10, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Amount of notice required to terminate tenancy not governed by this section, see § 89-7-23.

RESEARCH REFERENCES

ALR. Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 A.L.R.3d 177.

Retaliatory eviction of tenant for reporting landlord's violation of law. 40 A.L.R.3d 753.

Lease provisions allowing termination or forfeiture for violation of law. 92 A.L.R.3d 967.

Circumstances excusing lessee's failure to give timely notice of exercise of option to renew or extend lease. 27 A.L.R.4th 266.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease. 29 A.L.R.4th 903.

What constitutes timely notice of exercise of option to renew or extend lease. 29 A.L.R.4th 956.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent-modern cases. 31 A.L.R.4th 1254.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease. 34 A.L.R.4th 857.

Specificity of description of premises as affecting enforceability of lease. 73 A.L.R.4th 236.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 60-70.

CJS. 51C C.J.S., Landlord and Tenant §§ 89, 130, 142, 144, 150, 173, 183.

§ 89-8-21. Tenant's security deposit.

(1) Any payment or deposit of money, the primary function of which is to secure the performance of a rental agreement or any part of such an agreement, other than a payment or deposit, including an advance payment of rent, made to secure the execution of a rental agreement shall be governed by the provisions of this section.

(2) Any such payment or deposit of money shall be held by the landlord for the tenant who is a party to such agreement. The claim of a tenant to such payment or deposit shall be governed by the provisions of this section. The claim of a tenant to such payment or deposit shall be prior to the claim of any creditor of the landlord.

(3) The landlord, by written notice delivered to the tenant, may claim of such payment or deposit only such amounts as are reasonably necessary to remedy the tenant's defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, to clean

such premises upon termination of the tenancy, or for other reasonable and necessary expenses incurred as the result of the tenant's default, if the payment or deposit is made for any or all of those specific purposes. The written notice by which the landlord claims all or any portion of such payment or deposit shall itemize the amounts claimed by such landlord. Any remaining portion of such payment or deposit shall be returned to the tenant no later than forty-five (45) days after the termination of his tenancy, the delivery of possession and demand by the tenant.

(4) The retention by a landlord or transferee of a payment or deposit or any portion thereof, in violation of this section and with absence of good faith, may subject the landlord or his transferee to damages not to exceed Two Hundred Dollars ($200.00) in addition to any actual damages.

SOURCES: Laws, 1991, ch. 478, § 11, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Duty of landlord to return all prepaid and unearned rent and security recoverable by tenant under this section if rental agreement is terminated, see § 89-8-13.

RESEARCH REFERENCES

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 522-528.

CJS. 51D C.J.S., Landlord and Tenant §§ 472-476.

§ 89-8-23. Duties of landlord.

(1) A landlord shall at all times during the tenancy:

(a) Comply with the requirements of applicable building and housing codes materially affecting health and safety;

(b) Maintain the dwelling unit, its plumbing, heating and/or cooling system, in substantially the same condition as at the inception of the lease, reasonable wear and tear excluded, unless the dwelling unit, its plumbing, heating and/or cooling system is damaged or impaired as a result of the deliberate or negligent actions of the tenant.

(2) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the deliberate or negligent act of the tenant or persons on the premises with the tenant's permission.

(3) Subject to the provisions of Section 89-8-5, the landlord and tenant may agree in writing that the tenant perform some or all of the landlord's duties under this section, but only if the transaction is entered into in good faith.

(4) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the tenant's affirmative act or failure to comply with his obligations under Section 89-8-25.

SOURCES: Laws, 1991, ch. 478, § 12, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Right of tenant to terminate tenancy for landlord's noncompliance with obligations imposed by this section, see § 89-8-13.

Right of tenant to make repairs of defects constituting breach of landlord's obligations under this section, see § 89-8-15.

JUDICIAL DECISIONS

1. In general.

This section is not a basis for holding a landlord negligent per se for all housing code violations, and such an interpretation would lead to inequitable and extreme results. Sweatt v. Murphy, 733 So. 2d 207 (Miss. 1998).

Because the Residential Landlord and Tenant Act informed the Mississippi Supreme Court's decision to hold that a warranty of habitability applied to residential leases, after concluding that such warranty would apply to mobile home lots, a court denied property management companies' motion for summary judgment in a tenant's suit to recover damages for personal injuries that he sustained when he tripped over a broken sidewalk in front of his rented lot; although the tenant had signed a lease stating that he was responsible for making all repairs, whether the tenant waived the warranty of habitability was a question for the jury. Moorman v. Tower Mgmt. Co., 451 F. Supp. 2d 846 (S.D. Miss. 2006).

RESEARCH REFERENCES

ALR. Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 A.L.R.3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 A.L.R.3d 521.

Validity of exculpatory clause in lease exempting lessor from liability. 49 A.L.R.3d 321.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 618-770.

CJS. 51C C.J.S., Landlord and Tenant §§ 366-373, 402-407.

§ 89-8-25. Duties of tenant.

A tenant shall:

(a) Keep that part of the premises that he occupies and uses as clean and as safe as the condition of the premises permits;

(b) Dispose from his dwelling unit all ashes, rubbish, garbage and other waste in a clean and safe manner in compliance with community standards;

(c) Keep all plumbing fixtures in the dwelling unit used by the tenant as clean as their condition permits;

(d) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, in the premises;

(e) Not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any other person to do so;

(f) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of their premises;

(g) Inform the landlord of any condition of which he has actual knowledge which may cause damage to the premises;

(h) To the extent of his legal obligation, maintain the dwelling unit in substantially the same condition, reasonable wear and tear excepted, and comply with the requirements of applicable building and housing codes materially affecting health and safety;

(i) Not engage in any illegal activity upon the leased premises as documented by a law enforcement agency.

SOURCES: Laws, 1991, ch. 478, § 13; Laws, 1994, ch. 331, § 1, eff from and after July 1, 1994.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:

"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

Cross References — Right of landlord to terminate tenancy for tenant's noncompliance with obligations imposed by this section, see § 89-8-13.

Right of tenant to receive reimbursement for expense of repairs if tenant has fulfilled his affirmative obligations under this section, see § 89-8-15.

No duty on part of landlord arises in connection with defect caused by tenant's failure to comply with his obligations under this section, see § 89-8-23.

RESEARCH REFERENCES

ALR. Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 A.L.R.3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 A.L.R.3d 521.

Tenant's obligation under lease as basis of tort liability to third persons. 44 A.L.R.3d 943.

Validity of exculpatory clause in lease exempting lessor from liability. 49 A.L.R.3d 321.

Express or implied restriction on lessee's use of residential property for business purposes. 46 A.L.R.4th 496.

Landlord's liability to third party for repairs authorized by tenant. 46 A.L.R.5th 1.

Am Jur. 49 Am. Jur. 2d, Landlord and Tenant §§ 771-824.

CJS. 51C C.J.S., Landlord and Tenant §§ 102-119, 387-401.

§ 89-8-27. Housing authorities authorized to contract with tenant management organizations; authority to sell public housing units to tenant management organizations.

Any county, municipality, regional housing authority or local housing authority in the state may make application to and contract with qualified tenant management organizations for the operation and management of housing projects of the authority as a means of reducing vacancies, reducing administrative costs and creating jobs from the establishment of maintenance teams. Such counties, municipalities, regional housing authorities or local housing authorities shall have the authority to sell public housing units to such tenant management organizations, provided that such sale is in compliance with any applicable federal laws and regulations and any applicable state laws and regulations.

SOURCES: Laws, 1991, ch. 478, § 14, eff from and after July 1, 1991.

Editor's Note — Laws of 1991, ch. 478, § 16, provides:
"SECTION 16. This act shall take effect and be in force from and after July 1, 1991, and shall apply only to rental agreements entered into after such date."

RESEARCH REFERENCES

Law Reviews. Note: Developing a housing plan for Mississippi: some program and funding alternatives. 61 Miss. L. J. 605, Winter, 1991.

Beard and Hopkins, Building homes, building neighborhoods: family selection and family nurture for low income housing in two southern communities. 61 Miss. L. J. 631, Winter, 1991.

§ 89-8-29. Derrick Beard Act; termination of lease of residential premises by cosigner upon death of lessee; presumption of termination; cosigner's choice not to terminate; effect of termination on certain liabilities of lessee's estate or cosigner; applicability of section.

(1) This section shall be known and may be cited as the "Derrick Beard Act."

(2) Any cosigner of a lease of a residential premises may terminate, and is presumed to have terminated, the lease before its expiration date upon the death of the lessee or, if there is more than one (1) lessee, upon the death of all lessees. The cosigner must provide notice to the lessor within thirty (30) days of the death of the lessee, or upon the death of all the lessees, if he or she chooses not to terminate the lease.

(3) The termination of a lease under this section shall not relieve the lessee's estate or lessee's cosigner from liability for:

(a) The payment of rent or other sums owed before the lessee's death or the death of all lessees;

(b) The payment of rent or other sums owed for the remainder of the month or other thirty-day period during which the death occurred; or

(c) The payment of amounts necessary to restore the premises to its condition at the commencement of the tenancy, ordinary wear and tear excepted.

(4) Any attempted waiver by a lessor and lessee or lessee's cosigner, by contract or otherwise, of the right of termination provided by this section shall be void and unenforceable.

(5) The provisions of this section shall apply to leases entered into or renewed from and after July 1, 2011.

SOURCES: Laws, 2011, ch. 392, § 1, eff from and after July 1, 2011.

CHAPTER 9

Condominiums

Sec.
89-9-1. Citation of chapter.
89-9-3. Purpose of chapter.
89-9-5. Definitions.
89-9-7. Condominium constitutes real property.
89-9-9. Recordation of plan; amendment or revocation.
89-9-11. Conveyance of unit or apartment, etc., which is part of unit presumed to convey entire condominium.
89-9-13. Incidents of condominium grant.
89-9-15. Partition of common areas or of tenancy in common in condominium.
89-9-17. Recording, enforcement and provisions of declaration of restrictions.
89-9-19. Restrictions on sales and leases of units in project; first refusal of management not mandatory.
89-9-21. Liability of owner for assessment upon condominium; lien on assessed condominium; recording, priority, enforcement, etc., of lien.
89-9-23. Lien for labor performed or services or materials furnished.
89-9-25. Acquisition, etc., of personal property by management body for benefit of condominium owners; transfer of beneficial interest.
89-9-27. Construction of deed, declaration, or plan for condominium project.
89-9-29. Liabilities of unit owners.
89-9-31. Taxes and special assessments; provisions of declaration enforceable after foreclosure of assessment, tax deed, etc.; exemption as homestead.
89-9-33. Construction of local zoning ordinances.
89-9-35. Action for partition of condominium project by sale thereof.
89-9-37. Action for partition of condominium project by sale; venue; powers of court; sale.

§ 89-9-1. Citation of chapter.

This chapter shall be known and may be cited as the "Mississippi Condominium Law."

SOURCES: Codes, 1942, § 896-01; Laws, 1964, ch. 270, § 1.

Cross References — Inclusion of condominium units within exemptions from taxation of homesteads, see § 27-33-19.

RESEARCH REFERENCES

ALR. Liability of condominium association or corporation for injury allegedly caused by condition of premises. 45 A.L.R.3d 1171.

Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses. 65 A.L.R.3d 1212.

Proper party plaintiff in action for injury to common areas of condominium development. 69 A.L.R.3d 1148.

Validity and construction of condominium association's regulations governing members' use of common facilities. 72 A.L.R.3d 308.

Standing to bring action relating to title in real property of condominium. 72 A.L.R.3d 314.

Self-dealing by developers of condominium project as affecting contracts or leases with condominium association. 73 A.L.R.3d 613.

Enforceability of bylaw or other rule of condominium or co-operative association restricting occupancy by children. 100 A.L.R.3d 241.

Regulation of time-share or interval ownership interests in real estate. 6 A.L.R.4th 1288.

Condominium association's liability to unit owner for injuries caused by third person's criminal conduct. 59 A.L.R.4th 489.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 1-3.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 1 et seq.

§ 89-9-3. Purpose of chapter.

The purpose of this chapter is to give statutory recognition to the condominium form of ownership of real property. It shall not be construed as repealing or amending any law now in effect except those in conflict herewith, and any such conflicting laws shall be affected only insofar as they apply to condominiums.

SOURCES: Codes, 1942, § 896-02; Laws, 1964, ch. 270, § 2.

§ 89-9-5. Definitions.

For the purpose of this chapter, the following words and phrases as used herein, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "Condominium" means that form of ownership of property under which units of improvements are subject to ownership by different owners and there is appurtenant to each unit as part thereof an undivided share in the common areas.

(2) "Unit" means the elements of a condominium which are not owned in common with the owners of other condominiums in the project.

(3) "Project" means the entire parcel of real property divided, or to be divided into condominiums, including all structures thereon.

(4) "Common areas" means the entire project excepting all units therein granted or reserved.

(5) "To divide" real property means to divide the ownership thereof by conveying one or more condominiums therein but less than the whole thereof.

(6) "Real property" means and includes an estate in fee simple in the land or a leasehold therein or any other estate in land recognized by law together with the building or buildings, all improvements and structures thereon and all easements, rights, and appurtenances belonging thereto.

SOURCES: Codes, 1942, § 896-03; Laws, 1964, ch. 270, § 3; Laws, 1970, ch. 306, § 1, eff from and after passage (approved March 2, 1970).

JUDICIAL DECISIONS

1. Parking space.
2. Re-subdividing.

1. Parking space.

Pursuant to Miss. Code Ann. § 89-9-5(2) and (4), a unit contained only non-common elements, and since the Declaration of Condominium was never validly amended, the disputed parking space remained a common element of the condominium, and all owners in the condominium complex owned the parking space as owners of a common element of a condominium; however, the owner still had the exclusive right to use the parking space, free from interference by the neighbors, as stated in the Declaration of Condominium. Brice v. Ferrell, 918 So. 2d 887 (Miss. Ct. App. 2006).

2. Re-subdividing.

Construing the term "re-subdivided" most strongly against the homeowners and in favor of the developer, the prohibition that the lots were not to be re-subdivided meant that the platted lots were not to be divided into smaller tracts of land and then re-platted as a subdivision, and it would be unreasonable to find that the covenant drafters intended that a lot owner, who alienated a portion of a lot without assigning it a separate lot number, was engaged in prohibited re-subdividing, especially so in light of the covenant's allowance of multi-family residential structures on the lots, which contemplated more than one property owner per lot; the evidence before the chancellor pertaining to the definition of multi-family residential use was that it included condominiums. COR Devs., LLC v. College Hill Heights Homeowners, LLC, 973 So. 2d 273 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 1-3.

§ 89-9-7. Condominium constitutes real property.

A condominium is an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial, or commercial building on such real property, such as an apartment, office, or store. A condominium may include in addition a separate interest in other portions of such real property.

Such estate may, with respect to the duration of its enjoyment, be in fee simple, leasehold or any other estate in real property recognized by law.

SOURCES: Codes, 1942, § 896-04; Laws, 1964, ch. 270, § 4; Laws, 1970, ch. 306, § 2, eff from and after passage (approved March 2, 1970).

Cross References — Partition of property, see §§ 11-21-1 et seq.
Party walls, see §§ 89-15-1 et seq.

RESEARCH REFERENCES

ALR. Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 1-3.

7 Am. Jur. Legal Forms 2d, Deeds § 87.23.1 (deed with covenants of title time-share condominium).

§ 89-9-9. Recordation of plan; amendment or revocation.

The provisions of this chapter shall apply to property divided or to be divided into condominiums only if there shall be recorded in the office of the chancery clerk in the county in which such property lies a plan consisting of (a) a description or survey map of the surface of the land included within the project, (b) diagrammatic floor plans of the building or buildings built or to be built thereon in sufficient detail to identify each unit, its relative location and approximate dimensions, and (c) a certificate consenting to the recordation of such plan pursuant to this chapter signed and acknowledged by the record owner of such real property and all record holders of security interests therein. Such plan may be amended or revoked by a subsequently acknowledged recorded instrument executed by the record owner of such real property and by all record holders of security interests therein. Until such recordation of a revocation, the provisions of this chapter shall continue to apply to such real property. The term "record owner" as used in this section includes all of the record owners of such real property at the time of recordation, but does not include holders of security interests, mineral or royalty interests, easements or rights of way.

SOURCES: Codes, 1942, § 896-05; Laws, 1964, ch. 270, § 5; Laws, 1970, ch. 306, § 3, eff from and after passage (approved March 2, 1970).

Cross References — Recording of instruments generally, see §§ 89-5-1 et seq.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 6-9.

§ 89-9-11. Conveyance of unit or apartment, etc., which is part of unit presumed to convey entire condominium.

Unless otherwise expressly stated therein, any transfer or conveyance of a unit or an apartment, office or store which is a part of the unit, shall be presumed to transfer or convey the entire condominium.

SOURCES: Codes, 1942, § 896-06; Laws, 1964, ch. 270, § 6.

RESEARCH REFERENCES

ALR. Self-dealing by developers of condominium project as affecting contracts or leases with condominium association. 73 A.L.R.3d 613.

Am Jur. 7 Am. Jur. Legal Forms 2d, Deeds § 87.23.1 (deed with covenants of title time-share condominium).

§ 89-9-13. Incidents of condominium grant.

Unless otherwise expressly provided in the deeds, declaration of restrictions or plan, incidents of a condominium grant are as follows:

(1) The boundaries of the unit granted are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the unit includes both the portions of the building so described and the airspace so encompassed. The following are not part of the unit: bearing walls, columns, floors, roofs, foundations, elevator equipment and shafts, central heating, central refrigeration and central air-conditioning equipment, reservoirs, tanks, pumps and other central services, pipes, ducts, flues, chutes, conduits, wires and other utility installations, wherever located, except the outlets thereof when located within the unit. In interpreting deeds and plans the existing physical boundaries of the unit or of a unit reconstructed in substantial accordance with the original plans thereof shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or plan, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.

(2) The common areas are owned by the owners of the units as tenants in common, in equal shares, one for each unit.

(3) A nonexclusive easement for ingress, egress and support through the common areas is appurtenant to each unit, and the common areas are subject to such easement.

(4) Each condominium owner shall have the exclusive right to paint, repaint, tile, wax, paper, or otherwise refinish and decorate the inner surfaces of the walls, ceilings, floors, windows and doors bounding his own unit.

SOURCES: Codes, 1942, § 896-07; Laws, 1964, ch. 270, § 7.

RESEARCH REFERENCES

ALR. Validity and enforceability of condominium owner's covenant to pay dues or fees to sports or recreational facility. 39 A.L.R.4th 129.

Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Am Jur. 29 Am. Jur. Trials 157, Condominium Construction Litigation: Representing the Community Association.

§ 89-9-15. Partition of common areas or of tenancy in common in condominium.

Except as provided in Section 89-9-35, the common areas shall remain undivided, and there shall be no judicial partition thereof. Nothing herein shall be deemed to prevent partition of a tenancy in common in a condominium.

SOURCES: Codes, 1942, § 896-08; Laws, 1964, ch. 270, § 8.

Cross References — Partition of property generally, see §§ 11-21-1 et seq.

RESEARCH REFERENCES

Am Jur. 29 Am. Jur. Trials 157, Condominium Construction Litigation: Representing the Community Association.

§ 89-9-17. Recording, enforcement and provisions of declaration of restrictions.

The owner of a project shall, prior to the conveyance of any condominium therein, record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project. Such servitudes, unless otherwise provided, may be enforced by any owner of a condominium in the project, and may provide, among other things:

(1) For the management of the project by one or more of the following management bodies: the condominium owners, a board of governors elected by the owners or a management agent elected by the owners or the board or named in the declaration; for voting majorities; quorums, notices, meeting dates and other rules governing such body or bodies; and for recordation from time to time, as provided for in the declaration, of certificates of identity of the persons then composing such management body or bodies, which certificates shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

(2) As to any such management body:

(i) For the powers thereof, including power to enforce the provisions of the restrictions;

(ii) For maintenance by it of fire, casualty, liability, workmen's compensation and other insurance insuring condominium owners, and for bonding of the members of any management body;

(iii) For provision by it of payment by it for maintenance, utility, gardening and other services benefiting the common areas; for employment of personnel necessary for operation of the building, and for legal and accounting services;

(iv) For purchase by it of materials, supplies and the like and for maintenance and repair of the common areas;

(v) For payment by it of taxes and special assessments which would be lien upon the entire project or common areas, and for discharge by it of any lien or encumbrance levied against the entire project or common areas;

(vi) For payment by it for reconstruction of any portion or portions of the project damaged or destroyed;

(vii) For delegation by it of its powers;

(viii) For entry by it or its agents into any unit when necessary in connection with maintenance or construction for which such body is responsible;

(ix) For an irrevocable power of attorney to the management body to sell the entire project for the benefit of all of the owners thereof when partition of the project may be had under Section 89-9-35 which said power shall:

(a) Be binding upon all the owners, whether they assume the obligations of the constructions or not;

(b) If so provided in the declaration, be exercisable by less than all, but not less than a majority of the management body;

(c) Be exercisable only after recording of a certificate by those who have power to exercise it, that said power is properly exercisable hereunder, which certificate shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

(3) For amendments of such restrictions, which amendments, if reasonable and made upon vote or consent of not less than a majority in interest of the owners of the project given after reasonable notice, shall be binding upon every owner and every condominium subject thereto whether the burdens thereon are increased or decreased thereby, and whether the owner of each and every condominium consents thereto or not.

(4) For independent audit of the accounts of any management body.

(5)(i) For reasonable assessments to meet authorized expenditures of any management body, and for a reasonable method for notice and levy thereof, each condominium to be assessed separately for its share of such expenses in proportion, unless otherwise provided, to its owner's fractional interest in any common area;

(ii) For the subordination of the liens securing such assessments to other liens either generally or specifically described.

(6) For the restrictions upon the severability of the component interests in real property which comprise a condominium.

(7) For such covenants and restrictions concerning the use, occupancy and transfer of the units as are permitted by law with reference to real property.

SOURCES: Codes, 1942, § 896-09; Laws, 1964, ch. 270, § 9.

Editor's Note — Chapter 408 of Laws of 1984 (§ 71-3-1) changed the title of the Workmen's Compensation Law to "Workers' Compensation Law" and provided that the words "workmen's compensation" shall mean "workers' compensation" and "commission" shall mean "workers' compensation commission".

Cross References — Recording of instruments generally, see §§ 89-5-1 et seq.

RESEARCH REFERENCES

ALR. Self-dealing by developers of condominium project as affecting contracts or leases with condominium association. 73 A.L.R.3d 613.

Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association. 13 A.L.R.4th 598.

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting sale, transfer, or lease of condominium units. 17 A.L.R.4th 1247.

Validity and construction of law regulating conversion of rental housing to condominiums. 21 A.L.R.4th 1083.

Right of condominium association's management or governing body to inspect individual units. 41 A.L.R.4th 730.

Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners. 76 A.L.R.4th 295.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 10-12, 24, 25, 27, 35-38, 46, 53.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 1 et seq. (rights and obligations of owners among themselves).

5A Am. Jur. Legal Forms 2d, Condominiums §§ 64:33 et seq. (management and operation).

5A Am. Jur. Legal Forms 2d, Condominiums § 64:82 (declaration of covenants, conditions, and restrictions and power of attorney by owner and developer).

7 Am. Jur. Legal Forms 2d, Covenants and Restrictions § 77:88 (restrictions on use of condominium unit).

31 Am. Jur. Trials 193, Litigation Between Association Members for Breach of Condominium Provisions: Noise.

5 Am. Jur. Proof of Facts 3d, Condominium Association's Failure to Protect Residents and Guests from Criminal Attack, §§ 1 et seq.

§ 89-9-19. Restrictions on sales and leases of units in project; first refusal of management not mandatory.

The restrictions and covenants authorized by Section 89-9-17 may prescribe regulations concerning sales or leases of units, and any such restrictions and covenants shall be valid, but it shall not be mandatory that the management body be given the first right or refusal to purchase or lease any such unit which the owner thereof intends to sell or lease.

SOURCES: Codes, 1942, § 896-10; Laws, 1964, ch. 270, § 10; Laws, 1964, ch. 270, § 10; Laws, 1971, ch. 310, § 1, eff from and after passage (approved February 4, 1971).

RESEARCH REFERENCES

ALR. Self-dealing by developers of condominium project as affecting contracts or leases with condominium association. 73 A.L.R.3d 613.

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting sale, transfer, or lease of condominium units. 17 A.L.R.4th 1247.

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting number of units that may be owned by single individual or entity. 39 A.L.R.4th 88.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners. 76 A.L.R.4th 295.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments § 42.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Form 5 (complaint, petition, or declaration against co-owner alleging failure of selling unit to give right of "first refusal" as required by covenants, conditions, and restrictions).

§ 89-9-21. Liability of owner for assessment upon condominium; lien on assessed condominium; recording, priority, enforcement, etc., of lien.

A reasonable assessment upon any condominium made in accordance with a recorded declaration of restrictions permitted by Section 89-9-17 shall be a debt of the owner thereof at the time the assessment is made. The amount of any such assessment plus any other charges thereon, such as interest, costs, attorneys' fees, and penalties, as such may be provided for in the declaration of restrictions, shall be and become a lien upon the condominium assessed when the management body causes to be recorded in the office of the chancery clerk of the county in which such condominium is located a notice of assessment, which shall state the amount of such assessment and such other charges thereon as may be authorized by the declaration of restrictions, a description of the condominium against which the same has been assessed, and the name of the record owner thereof. Such notice shall be signed and verified by an authorized representative of the management body or as otherwise provided in the declaration of restrictions. Such lien shall be recorded in a condominium lien book alphabetically by name of the condominium unit owner, and such books need not be obtained until a condominium plat shall have been first recorded in said county. Upon payment of said assessment and charges in connection with which such notice has been so recorded, or other satisfaction thereof, the management body shall cause to be recorded a further notice stating the satisfaction and the release of the lien thereof.

Such lien shall be prior to all other liens recorded subsequent to the recordation of said notice of assessment except that the declaration of restrictions may provide for the subordination thereof to any other liens and encumbrances. Unless sooner satisfied and released, or the enforcement thereof initiated as hereafter provided, such lien shall expire and be of no further force or effect one year from the date of recordation of said notice of assessment; provided, however, that said one-year period may be extended by the management body for a time not to exceed one (1) additional year by recording a written extension thereof.

Such lien against any unit may be enforced by sale of same by the management body, its attorney or other person authorized to make the sale, after failure of the owner to pay such an assessment in accordance with its terms, such sale to be conducted in accordance with the provisions of Section 89-1-55, applicable to the exercise of powers of sale in mortgages and deeds of trust, or in any other manner permitted by law. Unless otherwise provided in the declaration of restrictions, the management body shall have power to bid in the condominium at foreclosure sale and to hold, lease, mortgage and convey the same. Suit to recover a money judgment for unpaid assessments may be maintained without waiving the lien securing the same.

SOURCES: Codes, 1942, § 896-11; Laws, 1964, ch. 270, § 11.

Cross References — Liens generally, see §§ 85-7-1 et seq.

JUDICIAL DECISIONS

1. Applicability.

By a request to amend its complaint against a debtor to seek foreclosure, a lienholder properly initiated foreclosure, even though the request was not granted until months later because, pursuant to Miss. R. Civ. P. 15, the granting of a motion to amend related back to the original pleadings; thus, the lienholder initiated foreclosure proceedings prior to the expiration of the one-year extension of a condominium lien pursuant to Miss. Code Ann. § 89-9-21. Tally Arms Condo. Ass'n v. Breland, 854 So. 2d 28 (Miss. Ct. App. 2003).

Court disagreed that the lienholder was entitled to more than its original lien amount because there was no authority that allowed a condominium assessment to include language that could encompass all later unfiled assessments. Tally Arms Condo. Ass'n v. Breland, 854 So. 2d 28 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR. Expenses for which condominium association may assess unit owners. 77 A.L.R.3d 1290.

Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 28, 47, 56, 60.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 21 et seq. (assessments).

5 Am. Jur. Proof of Facts 3d, Condominium Association's Failure to Protect Residents and Guests from Criminal Attack, §§ 1 et seq.

§ 89-9-23. Lien for labor performed or services or materials furnished.

No labor performed or services or materials furnished with the consent of or at the request of a condominium owner or his agent or his contractor or subcontractor shall be the basis for the filing of a lien against the condominium of any other condominium owner, or against any part thereof, or against any other property of any other condominium owner, unless such other owner has expressly consented to or requested the performance of such labor or furnishing of such materials or services. Such express consent shall be deemed to have been given by the owner of any condominium in the case of emergency repairs thereto. Labor performed or services or materials furnished for the common areas, if duly authorized by a management body provided for in a declaration of restrictions governing the property, shall be deemed to be performed or furnished with the express consent of each condominium owner. The owner of any condominium may remove his condominium from a lien against two (2) or more condominiums or any part thereof by payment to the holder of the lien of the fraction of the total sum secured by such lien which is attributable to his condominium.

SOURCES: Codes, 1942, § 896-12; Laws, 1964, ch. 270, § 12.

Cross References — Liens generally, see §§ 85-7-1 et seq.

RESEARCH REFERENCES

ALR. Expenses for which condominium association may assess unit owners. 77 A.L.R.3d 1290.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 28, 47, 56, 60.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 21 et seq. (assessments).

§ 89-9-25. Acquisition, etc., of personal property by management body for benefit of condominium owners; transfer of beneficial interest.

Unless otherwise provided by a declaration of restrictions under Section 89-9-17, the management body, if any, provided for therein, may acquire and hold, for the benefit of the condominium owners, tangible and intangible personal property and may dispose of the same by sale or otherwise; and the beneficial interest in such personal property shall be owned by the condominium owners in the same proportion as their respective interests in the common areas, and shall not be transferrable except with a transfer of a condominium. A transfer of a condominium shall transfer to the transferee ownership of the transferor's beneficial interest in such personal property.

SOURCES: Codes, 1942, § 896-13; Laws, 1964, ch. 270, § 13.

RESEARCH REFERENCES

ALR. Self-dealing by developers of condominium project as affecting contracts or leases with condominium association. 73 A.L.R.3d 613.

Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association. 13 A.L.R.4th 598.

§ 89-9-27. Construction of deed, declaration, or plan for condominium project.

Any deed, declaration, or plan for a condominium project shall be liberally construed to facilitate the operation of the project, and its provisions shall be presumed to be independent and severable.

SOURCES: Codes, 1942, § 896-14; Laws, 1964, ch. 270, § 14.

§ 89-9-29. Liabilities of unit owners.

A. The liability of the owner of a unit for common expenses shall be limited to the amounts for which he is assessed from time to time in accordance with this chapter and the declaration.

B. The owners of a unit shall have no personal liability for any damages caused by the governing body on or in connection with the use of common areas. A unit owner shall be liable for injuries or damages resulting from an accident in his own unit to the same extent and degree that the owner of a house, an office, or a store would be liable for an accident occurring therein.

SOURCES: Codes, 1942, § 896-15; Laws, 1964, ch. 270, § 15.

RESEARCH REFERENCES

ALR. Expenses for which condominium association may assess unit owners. 77 A.L.R.3d 1290.

Personal liability of owner of condominium unit to one sustaining personal injuries or property damage by condition of common areas. 39 A.L.R.4th 98.

Liability of owner of unit in condominium, recreational development, timeshare property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner. 39 A.L.R.4th 114.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 44, 57-60.

7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 51 et seq. (rights and obligations between owners and third persons).

5 Am. Jur. Proof of Facts 3d, Condominium Association's Failure to Protect Residents and Guests from Criminal Attack, §§ 1 et seq.

§ 89-9-31. Taxes and special assessments; provisions of declaration enforceable after foreclosure of assessment, tax deed, etc.; exemption as homestead.

(1) Property taxes and special assessments assessed by municipalities, counties, the State of Mississippi, and other taxing authorities shall be assessed against and collected on the unit and the common areas and not upon the project as a whole. Each unit and common areas shall be separately assessed for ad valorem taxes and special assessments as a single parcel. The taxes and special assessments levied against each unit and common areas shall constitute a lien only upon such unit and common areas so assessed and upon no other portion of the project.

(2) All provisions of a declaration relating to a unit or common areas sold for taxes or special assessments shall survive and be enforceable after the issuance of a tax deed or other deed upon foreclosure of an assessment, certificate, or lien, a tax deed, tax certificate, or tax lien to the same extent that they would be enforceable against a voluntary grantee, immediate, mediate, or remote, of the owner of the title immediately prior to the delivery of the tax deed or other deed.

(3) Any unit of a condominium project shall be eligible for exemption under the Homestead Exemption Act of 1946, Sections 27-33-1 through 27-33-65, Mississippi Code of 1972, if all other criteria of said sections are met.

SOURCES: Codes, 1942, § 896-16; Laws, 1964, ch. 270, § 16; Laws, 1971, ch. 481, § 1, eff from and after passage (approved March 31, 1971).

Cross References — Exemption of homesteads from certain taxes, see § 27-33-19. Tax liens generally, see §§ 27-43-1 et seq.

RESEARCH REFERENCES

ALR. Real-estate taxation of condominiums. 71 A.L.R.3d 952.

Am Jur. 15A Am. Jur. 2d, Condominiums and Cooperative Apartments §§ 48-50.

§ 89-9-33. Construction of local zoning ordinances.

Unless a contrary intent is clearly expressed, local zoning ordinances shall be construed to treat like structures, lots, or parcels in like manner regardless of whether the ownership thereof is divided by sale of condominiums or into community apartments rather than by lease of apartments, offices, or stores.

SOURCES: Codes, 1942, § 896-17; Laws, 1964, ch. 270, § 17.

RESEARCH REFERENCES

ALR. Zoning or building regulations as applied to condominiums. 71 A.L.R.3d 866.

§ 89-9-35. Action for partition of condominium project by sale thereof.

Where several persons own condominiums, as defined in the Mississippi Condominium Law, in a condominium project, as defined in said law, an action may be brought by one or more of such persons for partition thereof by sale of the entire project, as though the owners of all of the condominiums in such project were tenants in common in the entire project in the same proportion as their interests in the common areas; provided, however, that a partition shall be made only upon the showing that: (1) three (3) years after damage or destruction to the project which renders a material part thereof unfit for its use prior thereto, the project has not been rebuilt or repaired substantially to its state prior to its damage or destruction, or (2) that three-fourths (¾) or more of the project has been destroyed or substantially damaged, and that condominium owners holding in aggregate more than a fifty percent (50%) interest in the common areas are opposed to repair or restoration of the project, or (3) that the project has been in existence in excess of fifty (50) years, that it is obsolete and uneconomic, and that condominium owners holding in aggregate more than a fifty percent (50%) interest in the common areas are opposed to repair or restoration of the project, or (4) that conditions for such a partition by sale set forth in the declaration of restrictions entered into with respect to such project, pursuant to the provisions of the Mississippi Condominium Law, have been met.

SOURCES: Codes, 1942, § 896-18; Laws, 1964, ch. 270, § 18.

Cross References — Partition of property, generally, see §§ 11-21-1 et seq.

RESEARCH REFERENCES

ALR. Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Am Jur. 7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 41 et seq. (partition).

§ 89-9-37. Action for partition of condominium project by sale; venue; powers of court; sale.

Such action for partition by sale shall be brought in the chancery court of that county in which the project or some part thereof is situated, subject to the provisions for partition of lands by sale, as far as applicable, and the court shall have power to make all such orders as may be necessary to protect the rights of parties, and any sale ordered in such cases shall be made and reported as in the case of the sale of land; and decrees making partition shall vest title according to their terms. In such cases the court or chancellor may make all orders, and cause to be issued all process necessary to secure the rights of parties.

SOURCES: Codes, 1942, § 896-19; Laws, 1964, ch. 270, § 19.

RESEARCH REFERENCES

ALR. Standing to bring action relating to real property of condominium. 74 A.L.R.4th 165.

Am Jur. 7 Am. Jur. Pl & Pr Forms (Rev), Condominiums and Cooperative Apartments, Forms 41 et seq. (partition).

CHAPTER 11

Escheats

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89-11-31. Sale of severed minerals which escheat to the state.

§ 89-11-1. When property shall escheat.

If any person die intestate, seized of or holding, either in possession or in right, at the time of his death, real or personal property, or money or choses in action, whether such person were a citizen of the state or not, and leave no heir capable of inheriting the same, all such property shall escheat to the state.

SOURCES: Codes, 1857, ch. 17, art. 1; 1871, § 1844; 1880, § 881; 1892, § 1701; 1906, § 1878; Hemingway's 1917, § 1521; 1930, § 1511; 1942, § 480.

Cross References — Escheat of funds held by receiver of unknown or nonresident owner of mineral interest, see § 11-17-34.

Escheat of public lands purchased in violation of statute, see § 29-1-73.

Procedures for sale of severed minerals which escheat to the state, see § 89-11-31.

JUDICIAL DECISIONS

1. In general.

The state, both in view of its rights under escheat to the property of intestates who die without heirs and parens patriae for the protection of the interests of any possible unknown heir who might appear, may bring suit to contest a probated will. Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806 (1938).

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 2 et seq.

27A Am. Jur. 2d, Escheat §§ 1 et seq.

§ 89-11-3. County administrator or sheriff is escheator; his duty, and duty of the assessor.

The county administrator, if there be one, and, if none, the sheriff, shall be escheator for his county, and he shall ascertain by all practicable means what estate or property within his county, for defect of heirs, has escheated to the state, and he shall institute proceedings therefor as hereinafter directed; and the assessor of taxes shall annually, on the completion of his assessment, report to the escheator a list of all property that may have escheated to the state within the preceding twelve (12) months, or previously if not already reported, or to which no heir is known; and the assessor shall also furnish the land commissioner with a copy of such report.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (2); 1857, ch. 17, art. 2; 1871, § 1845; 1880, § 882; 1892, § 1702; 1906, § 1879; Hemingway's 1917, § 1522; 1930, § 1512; 1942, § 481.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

Cross References — Granting of letters testamentary or of administration to county administrator, see §§ 91-7-79 et seq.

JUDICIAL DECISIONS

1. In general.

The sheriff, as public escheator, may bring suit to contest a probated will. Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806 (1938).

Land commissioner could not maintain escheat proceeding to recover gasoline tax subject to be refunded to dealer, where gasoline purchasers were unknown. Moore v. Eastman Gardiner Lumber Co., 156 Miss. 359, 126 So. 44 (1930).

§ 89-11-5. Proceedings to establish escheats.

In all cases when property may have escheated to the state, it shall be the duty of the escheator of the county in which said property may be to file in the chancery court a bill in the name of the state to have the escheat judicially declared; the bill shall contain a statement of the name of the last owner, and that he died without heirs, the names of all persons who claim an interest in the property, if any be known, and also a description of the property and who, if any one, is in possession, and an averment that the same has escheated to the state for want of heirs.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (2); 1857, ch. 17, art. 3; 1871, § 1846; 1880, § 883; 1892, § 1703; 1906, § 1880; Hemingway's 1917, § 1523; 1930, § 1513; 1942, § 482.

JUDICIAL DECISIONS

1. In general.

State must enforce escheat on strength of own title and not on weakness of defendant's. State ex rel. Nall v. Williams, 99 Miss. 293, 54 So. 951, Am. Ann. Cas. 1913E,381 (1911).

Intestate is presumed to have left heirs capable of inheriting. State ex rel. Nall v. Williams, 99 Miss. 293, 54 So. 951, Am. Ann. Cas. 1913E,381 (1911).

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 46 et seq.

27A Am. Jur. 2d, Escheat §§ 20 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 1 et seq. (proceedings to enforce escheat).

CJS. 30A C.J.S., Escheat §§ 14 et seq.

§ 89-11-7. What persons summoned; publication made.

On the filing of the bill, the clerk shall issue a summons to all persons residing in this state and named in the bill as having or claiming an interest in the property, and also to the person named as being in possession, to appear and answer the same; and he shall give notice, by publication as in other cases, to all parties, known or unknown, having or claiming an interest in the property, to appear and answer the bill; which notice shall contain a description of the property, and the name, residence, and place of death of the last owner, if known.

SOURCES: Codes, 1857, ch. 17, art. 4; 1871, § 1847; 1880, § 884; 1892, § 1704; 1906, § 1881; Hemingway's 1917, § 1524; 1930, § 1514; 1942, § 483.

§ 89-11-9. A claimant not a party may answer.

Any person who claims an estate or interest in property against which proceedings have been instituted to have an escheat judicially declared, though not named in the bill or summoned, may, nevertheless, appear and answer the bill, interposing his title or claim, but shall not recover costs unless it appear that he has some estate or interest in the property, even though the state fail in establishing an escheat.

SOURCES: Codes, 1857, ch. 17, art. 5; 1871, § 1848; 1880, § 885; 1892, § 1705; 1906, § 1882; Hemingway's 1917, § 1525; 1930, § 1515; 1942, § 484.

RESEARCH REFERENCES

ALR. Insured's right of action for arbitrary nonrenewal of policy, where insurer has option not to renew. 37 A.L.R.4th 862.

§ 89-11-11. Proceedings in court.

The proceedings shall be conducted as other suits in the chancery court; and, if determined in favor of the state, the court shall decree the property escheated to the state, and thereby the state shall be seized and possessed of the property in law and in fact; but no final decree shall be rendered therein within less than twelve (12) months from the commencement of the suit. The successor of the escheator who filed the bill may appear and conduct the suit without revivor or alteration of the pleadings.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (7); 1857, ch. 17, art. 6; 1871, § 1849; 1880, § 886; 1892, § 1706; 1906, § 1883; Hemingway's 1917, § 1526; 1930, § 1516; 1942, § 485.

§ 89-11-13. Persons in possession liable for rent or hire of escheated property.

The person in possession of escheated property shall be liable for the rent of real estate and hire of personal property, whether he claim title or not. Where the escheat is established, the court shall determine and decree rent or hire to the state, if any be due, and may make an allowance in proper cases to a party for the care of the property. In case the party in possession refuse or fail to deliver possession to the escheator who is authorized to receive the same, such party shall be liable to double the value of the rent or hire for the time he may so withhold possession, to be determined by the court on petition of the escheator. Decrees rendered in matters of escheats shall be conclusive against all parties thereto and privies, but may be reviewed by the supreme court on appeal.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (8); 1857, ch. 17, art. 7; 1871, § 1850; 1880, § 887; 1892, § 1707; 1906, § 1884; Hemingway's 1917, § 1527; 1930, § 1517; 1942, § 486.

RESEARCH REFERENCES

ALR. What constitutes tenant's holding over of leased premises. 13 A.L.R.5th 169.

§ 89-11-15. Reports by escheator.

On the establishment of any escheat of land, the escheator shall, within thirty (30) days, report the fact to the land commissioner, giving a description of the land and its value, under the direction of the court. The land commissioner shall at once register the land in the register of escheated lands.

SOURCES: Codes, 1892, § 1708; 1906, § 1885; Hemingway's 1917, § 1528; 1930, § 1518; 1942, § 487.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

Cross References — Duties and powers of land commissioner generally, see § 7-11-11.

Sale of escheated lands, see § 29-1-65.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Escheat §§ 40 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Form 17 (judgment or decree declaring property escheated and directing sale of property).

CJS. 30A C.J.S., Escheat § 27.

§ 89-11-17. Sale of escheated personalty; payment of debts.

The court which decrees any escheat thereof shall retain jurisdiction of personal property after decreeing the escheat, and shall require the same to be sold and the net proceeds to be paid into the state treasury; and it may provide for the payment of the debts of the deceased owner out of the proceeds of the personal property before the same be paid over; but any petition by a creditor, alleging an indebtedness due to him by the late owner of real or personal property which may escheat, must be filed in the suit for the declaration of the escheat before final hearing thereof, accompanied with the claim probated as if administration had been granted, or the claim will be barred.

SOURCES: Codes, 1892, § 1709; 1906, § 1886; Hemingway's 1917, § 1529; 1930, § 1519; 1942, § 488.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Escheat §§ 40 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Form 17 (judgment or decree declaring property escheated and directing sale of property).

CJS. 30A C.J.S., Escheat § 27.

§ 89-11-19. How real estate subjected to payments of debts.

If the personal property of a deceased owner of escheated property be insufficient for the payment of his debts, or if there be no personal property, the petition of the creditor must show the fact. In such case the court will require the land commissioner to be notified of the pendency of the petition, and he may appear and contest the petition. And if the real estate be decreed subject to the payment of debts, the court will order the sale of a sufficiency thereof for that purpose, and require any balance of proceeds to be paid into the state treasury through the land office.

SOURCES: Codes, 1892, 1710; 1906, § 1887; Hemingway's 1917, § 1530; 1930, § 1520; 1942, § 489.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

Cross References — Sale of escheated land, see § 29-1-65.

§ 89-11-21. Where escheated land is recovered from the purchaser.

If escheated land be recovered from the purchaser at the suit of an heir of the deceased owner, by proceeding instituted within ten (10) years after the escheat was declared, the state will refund to the purchaser the purchase-money with three percent (3%) per annum interest; the purchaser being liable to the heir for rents and profits, which he may recoup, pro tanto, by the improvements put upon the land, if any, and all taxes paid thereon. In all such suits to recover the land of the state's purchaser, or his assigns, the land commissioner shall be made a party.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (14); 1857, ch. 17, art. 10; 1871, § 1853; 1880, § 890; 1892, § 1711; 1906, § 1888; Hemingway's 1917, § 1531; 1930, § 1521; 1942, § 490.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Escheat §§ 44 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 31 et seq. (recovery, restoration or reimbursement).

CJS. 30A C.J.S., Escheat §§ 7, 8.

§ 89-11-23. Proceeds of personal property reclaimed.

Any person who is not concluded as a party or privy by a decree in favor of the state in proceedings to establish an escheat, may, at any time within six (6) years after the rendition of the decree, recover of the state, by suit, the net proceeds derived from the sale of personal property and paid into the state treasury, and three percent (3%) interest thereon, if the party shall establish his right to the property and that the same had not properly escheated to the state; but the title of the purchaser of such personal property shall not be thereby disturbed.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (14); 1857, ch. 17, art. 11; 1871, § 1854; 1880, § 891; 1892, § 1720; 1906, 1889; Hemingway's 1917, § 1532; 1930, § 1522; 1942, § 491.

§ 89-11-25. Proceedings, where had.

Proceedings to recover real property or the proceeds of personalty escheated, shall be by bill to open the decree declaring the escheat, in the court in which the escheat was decreed.

SOURCES: Codes, 1892, § 1713; 1906, § 1890; Hemingway's 1917, § 1533; 1930, § 1523; 1942, § 492.

§ 89-11-27. Costs shall be allowed as in other cases.

In case the property be not escheated, the costs incurred in behalf of the state shall be paid out of the state treasury, and the court shall cause the same to be certified to the auditor of public accounts, who shall issue his warrant therefor. In case the property shall be adjudged to be escheated, a reasonable commission and attorneys' fees shall be allowed by the court to the escheator, which shall be taxed as costs and, together with all other costs allowed by the court, shall be paid out of the proceeds of the personal property, if the said proceeds be sufficient to pay the same. If the personal property of a deceased owner of escheated property be insufficient for the payment of his debts and the costs so allowed by the court, or if there be no personal property, the court shall decree the real estate subject to the payment of the costs so allowed, and shall order the sale of a sufficiency thereof for that purpose, and require any balance of proceeds to be paid into the state treasury through the land office.

SOURCES: Codes, Hutchinson's 1848, ch. 46, art. 3 (18); 1857, ch. 17, art. 9; 1871, § 1852; 1880, § 889; 1892, § 1714; 1906, § 1891; Hemingway's 1917, § 1534; 1930, § 1524; 1942, § 493.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

Section 7-7-2, as added by Laws of 1984, ch. 488, § 90, and amended by Laws of 1985, ch. 455, § 14, Laws of 1986, ch. 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor", and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws of 1989, ch. 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws of 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

§ 89-11-29. Institution of escheat proceedings.

The land commissioner shall have the power to discharge all the duties and to exercise all the powers herein imposed and conferred upon the county administrator or the sheriff, as the case may be, and he may institute and conduct to final conclusion all escheat proceedings authorized under this chapter, the same to be conducted in the manner herein prescribed.

SOURCES: Codes, 1906, § 1892; Hemingway's 1917, § 1535; 1930, § 1525; 1942, § 494.

Editor's Note — Pursuant to Section 7-11-4, effective January 1, 1980, the words "state land commissioner," "land commissioner," "state land office" and "land office" shall mean the secretary of state.

Cross References — Duties and powers of land commissioner generally, see § 7-11-11.

Power of land commissioner to institute suits, see § 29-1-7.

JUDICIAL DECISIONS

1. In general.

Land commissioner could not maintain escheat proceeding to recover gasoline tax subject to be refunded to dealer, where gasoline purchasers were unknown. Moore v. Eastman Gardiner Lumber Co., 156 Miss. 359, 126 So. 44 (1930).

§ 89-11-31. Sale of severed minerals which escheat to the state.

Any severed minerals which escheat to the state under the provisions of Section 89-11-1 et seq. shall, within six (6) months after the rendition of a final decree declaring the property escheated to the state, be sold at the door of the courthouse in the county, or in the judicial district in counties having more than one (1) such district, wherein the mineral estate is located. Provided, however, that no mineral interest shall be sold if it is still producing income. Notice and advertisement of such sale shall be published each week for three (3) consecutive weeks in a newspaper published in the county, if any, and if no newspaper be published in a county, then in a newspaper having general circulation in the county and in a newspaper having a general circulation within the state, the first such publication to appear at least fifteen (15) days prior to the date fixed in said notice for such sale. Each severed mineral interest shall be sold to the highest and best bidder, except that the owner of the surface estate in which the subject mineral estate was severed may, at such sale, match the highest and best bid and be allowed to purchase said severed mineral estate, upon showing proper proof of ownership of all or part of the surface estate. The sale shall be continued from day to day, except Sundays, between the hours of 8:30 a.m. and 4:30 p.m. until completed.

SOURCES: Laws, 1980, ch. 531, eff from and after July 1, 1980.

Cross References — Circumstances under which property shall escheat to the state, see § 89-11-1.

RESEARCH REFERENCES

ALR. Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

CHAPTER 12

Uniform Disposition of Unclaimed Property Act

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89-12-57.	Provisions of chapter supplemental to Section 21-39-21.

§ 89-12-1. Short title.

This chapter shall be known and may be cited as the "Uniform Disposition of Unclaimed Property Act."

SOURCES: Laws, 1982, ch. 497, § 1, eff from and after July 1, 1982.

Cross References — Authority of municipalities with respect to lost, stolen, abandoned or misplaced personal property, see § 21-39-21.

Liquidated state trust company unclaimed property, see § 81-27-8.005 et seq.

Comparable Laws from other States — Alabama: Code of Ala. §§ 35-12-70 et seq.
Arkansas; A.C.A. § 18-28-201 et seq.
Illinois: 765 ILCS 1025/1 et seq.
Minnesota: Minn. Stat. §§ 345.31 et seq
Missouri: Mo. Rev. Stat. §§ 447.500 et seq.
Nebraska: R.R.S. Neb. §§ 69-1301 et seq.
Oklahoma: §§ 60 Okl. St. § 651 et seq.
Oregon: ORS §§ 98.302 et seq.
Tennessee: Tenn. Code Ann. §§ 66-29-101 et seq.
Virginia: §§ 55-210.1 et seq.

ATTORNEY GENERAL OPINIONS

Uniform Disposition of Unclaimed Property Act (Miss. Code Sections 89-12-1 et seq.) provides procedure for return of forfeited property where promptness requirement of Miss. Code Section 41-29-177 was not complied with, and for disposing of property where owners cannot be located. Magee, Jan. 8, 1993, A.G. Op. #92-0909.

RESEARCH REFERENCES

ALR. Uniform Disposition of Unclaimed Property Act. 98 A.L.R.2d 304.

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 2 et seq.

Jurisdictions adopting Uniform Disposition of Unclaimed Property Act, see Am. Jur. 2d Desk Book, Item No. 124.

25 Am. Jur. Proof of Facts 2d 685, Abandonment of Tangible Personal Property.

§ 89-12-3. Definitions.

As used in this chapter, unless the context otherwise requires:

(a) "Banking organization" means any national or state bank, trust company, savings bank, land bank, private banker, or any similar organization which is engaged in business in this state.

(b) "Business association" means any corporation, joint stock company, business trust, partnership, or any association for business purposes of two (2) or more individuals, whether organized for profit or nonprofit, including, but not limited to, a banking organization, financial organization, life insurance corporation and utility.

(c) "Financial organization" means any federal or state savings and loan association, building and loan association, credit union, cooperative bank or investment company, or any similar organization which is engaged in business in this state.

(d) "Holder" means any person in possession of property subject to the provisions of this chapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to the provisions of this chapter.

(e) "Insurance corporation" means any association or corporation transacting in this state the business of insurance involving in any manner a person or property; however, this term does not include self-insured workers' compensation groups or associations comprised of members who have joint and several liability for the workers' compensation obligation of the other members.

(f) "Intangible personal property" includes, but is not limited to:

(i) Monies, checks, drafts, deposits, interest, dividends, and income;

(ii) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances; except future and prior dividends made by the workers' compensation groups or associations described in paragraph (e);

(iii) Monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(iv) Amounts due and payable under the terms of insurance policies;

(v) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits;

(vi) Shares of corporate stock and other intangible ownership interests in business associations; and

(vii) Bonds, notes and other debt obligations.

(g) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to the provisions of this chapter, or his legal representative.

(h) "Apparent owner" means the person who appears from the records of the holder to be entitled to property held by the holder.

(i) "Person" means any individual, business association, government or political subdivision or agency, corporation, public authority, estate, trust, two (2) or more persons having a joint or common interest, or any other legal or commercial entity whether such person is acting in his own right or in a representative capacity.

(j) "Treasurer" means the State Treasurer of the State of Mississippi.

(k) "Utility" means any person who owns or operates in this state for public use, any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam or gas.

SOURCES: Laws, 1982, ch. 497, § 2; Laws, 1991, ch. 451, § 1; Laws, 2006, ch. 452, § 1, eff from and after July 1, 2006.

Cross References — State treasurer, generally, see §§ 7-9-1 et seq.

ATTORNEY GENERAL OPINIONS

Money qualifies as "intangible personal property" under Miss. Code Section 89-12-3(f)(i). Magee, Jan. 8, 1993, A.G. Op. #92-0909.

§ 89-12-5. Presumed abandonment of property held or owing by bank or other business association.

(1) Subject to the provisions of Sections 89-12-17 and 89-12-19, the following property held or owing by a banking or financial organization or by a business association shall be presumed abandoned:

(a) Any demand, savings, or matured time deposit made in this state with a banking organization or financial organization, together with any interest or dividend thereon, excluding any charges that may have accrued, unless the owner has, within five (5) years:

(i) Increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest; or

(ii) Corresponded in writing with the banking organization or financial organization concerning the deposit; or

(iii) Otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization or financial organization.

(b) Any sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, but not limited to, certificates of deposit, drafts, money orders and traveler's checks, that, with the exception of traveler's checks and money orders, has been outstanding for more than five (5) years from the date it was payable, or from the date of its issuance if payable on demand, or, in the case of traveler's checks, that has been outstanding for more than fifteen (15) years from the date of its issuance, or, in the case of money orders, that has been outstanding for more than seven (7) years from the date of its issuance, unless the owner has within five (5) years, or within fifteen (15) years in the case of traveler's checks or within seven (7) years in the case of money orders, corresponded in writing with the banking or financial organization or business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization or business association.

(2) Any certificate of deposit made in this state with a banking organization, together with an interest or dividend thereon, with a maturity date equal to or greater than ten (10) years shall be exempt from the time limit provisions of this chapter.

SOURCES: Laws, 1982, ch. 497, § 3; Laws, 1991, ch. 451, § 2, eff from and after July 1, 1991.

Cross References — Sums payable on money orders or traveler's checks presumed abandoned under this section as exempt from notice requirement, see § 89-12-27.

Payment or delivery of abandoned property to treasurer, see § 89-12-29.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 15.

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

Young, Trial Handbook for Mississippi Lawyers § 19:19.

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-7. Presumed abandonment of unclaimed funds held or owing by life insurance corporation.

(1) Subject to the provisions of Section 89-12-17, funds held or owing by a life insurance corporation under any life or endowment insurance policy or annuity contract which has matured or terminated shall be presumed abandoned if unclaimed and unpaid for more than five (5) years after the funds became due and payable as established from the records of the corporation.

(2) If a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the corporation or if it is not definite and certain from the records of the corporation what person is entitled to the funds, it shall be presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the corporation. This presumption is a presumption affecting the burden of proof.

(3) A life insurance policy not matured by actual proof of the death of the insured according to the records of the corporation shall be deemed to be matured and the proceeds due and payable if:

(a) The insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;

(b) The policy was in force at the time the insured attained, or would have attained, the limiting age specified in paragraph (a) of this subsection; and

(c) Neither the insured nor any other person appearing to have an interest in the policy has, within the preceding five (5) years, according to the records of the corporation:

(i) Assigned, readjusted, or paid premiums on the policy,

(ii) Subjected the policy to loan, or

(iii) Corresponded in writing with the life insurance corporation concerning the policy.

(4) Any funds otherwise payable according to the records of the corporation shall be deemed due and payable although the policy or contract has not been surrendered as required.

SOURCES: Laws, 1982, ch. 497, § 4; Laws, 1991, ch. 451, § 3, eff from and after July 1, 1991.

Cross References — Regulation of the insurance industry, generally, see §§ 83-1-1 et seq.

Recovery by another state of property paid or delivered to treasurer under this chapter, see § 89-12-21.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 17.

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

Young, Trial Handbook for Mississippi Lawyers § 19:19.

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-9. Presumed abandonment of funds held or owing by utility.

Subject to the provisions of Section 89-12-17 of this chapter, the following funds held or owing by any utility shall be presumed abandoned:

(a) Any deposit made by a subscriber with a utility to secure payment for, or any sum paid in advance for, utility services to be furnished in this state, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than five (5) years after the termination of the services for which the deposit or advance payment was made.

(b) Any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deduction, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than five (5) years after the date it became payable in accordance with the final determination or order providing for the refund.

SOURCES: Laws, 1982, ch. 497, § 5; Laws, 1991, ch. 451, § 4, eff from and after July 1, 1991.

Cross References — Regulation of public utilities, generally, see §§ 77-1-1 et seq.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 18.

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property,

Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-11. Presumed abandonment of dividend, interest and the like held or owing by business association for or to shareholder, bondholder and the like.

(1) Subject to the provisions of Section 89-12-17, and except as otherwise provided in subsections (2) and (5) of this section, stock or other intangible ownership interest in a business association which is held by the association, the existence of which is evidenced by records available to the association, is presumed abandoned if a dividend, distribution or other sum payable as a result of the interest has remained unclaimed by the owner for five (5) years and during that time the owner has not:

(a) Communicated in writing with the association regarding the interest or a dividend, distribution or other sum payable as a result of the interest; or

(b) Otherwise communicated with the association regarding the interest or a dividend, distribution or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by an employee of the association.

(2) At the expiration of a five-year period following the failure of the owner to claim a dividend, distribution or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least five (5) dividends, distributions or other sums paid during the period, none of which has been claimed by the owner. If five (5) dividends, distributions or other sums are paid during the five-year period, the time period leading to a presumption of abandonment commences on the date that payment of the first unclaimed dividend, distribution or other sum became due and payable. If five (5) dividends, distributions or other sums are not paid during the presumptive period, the period continues to run until there have been five (5) dividends, distributions or other sums that have not been claimed by the owner.

(3) The running of the five-year period of abandonment ceases immediately upon the occurrence of a communication as described in subsection (1) of this section. If any future dividend, distribution or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution or other sum became due and payable.

(4) At the time an interest is presumed abandoned under this section, any dividend, distribution or other sum then held for or owing to the owner as a result of the interest, and not previously abandoned, is presumed abandoned.

(5) This section does not apply to any stock or other intangible ownership of interest enrolled in a plan that provides for the automatic reinvestment of

dividends, distributions or other sums payable as a result of the interest unless the records available to the State Treasurer show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within five (5) years communicated in any manner described in subsection (1) of this section.

(6) Notwithstanding anything in this section or any other section in this chapter to the contrary, the property presumed abandoned under this chapter shall not include capital credits or patronage refunds offered for payment by nonprofit cooperative electric power associations, nonprofit cooperative water and sewer associations, or nonprofit agricultural cooperative marketing associations, but rather such unclaimed funds shall be used for the benefit of the general membership of such associations.

SOURCES: Laws, 1982, ch. 497, § 6; Laws, 1991, ch. 451, § 5; Laws, 1997, ch. 415, § 1, eff from and after July 1, 1997.

Cross References — Regulation of corporations, associations and partnerships, generally, see §§ 79-1-1 et seq.

Sale of securities listed on stock exchange, see § 89-12-30.

Relief from liability upon payment or delivery of abandoned property to treasurer, see § 89-12-31.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 16.

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

Young, Trial Handbook for Mississippi Lawyers § 19:19.

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-13. Presumed abandonment of intangible personal property held by fiduciary.

Subject to the provisions of Section 89-12-17, any intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person shall be presumed abandoned unless the owner has, within five (5) years after it became payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary.

SOURCES: Laws, 1982, ch. 497, § 7; Laws, 1991, ch. 451, § 6, eff from and after July 1, 1991.

RESEARCH REFERENCES

Am Jur. Young, Trial Handbook for Mississippi Lawyers § 19:19.

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-14. Presumed abandonment of intangible property held by business association, federal, state or local government or governmental subdivision, agency or entity.

(1) All intangible property, including, but not limited to, any interest, dividend, or other earnings thereon, less any lawful charges, held by a business association, federal, state or local government or governmental subdivision, agency or entity, or any other person or entity, regardless of where the holder may be found, if the owner has not claimed or corresponded in writing concerning the property within five (5) years after the date prescribed for payment or delivery, is presumed abandoned and subject to the custody of this state as unclaimed property if:

(a) The last known address of the owner is unknown; and

(b) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state, or is incorporated, organized, created or otherwise located in this state.

(2) The provisions of subsection (1) of this section shall not apply to property that is or may be presumed abandoned and subject to the custody of this state pursuant to any other provision of law containing a dormancy period different than that prescribed in subsection (1) of this section.

(3) The provisions of subsection (1) of this section shall apply to all property held on July 1, 1991, or at any time thereafter, regardless of when such property became or becomes presumptively abandoned.

(4) Insofar and only insofar as funds reflected by the cancellation of State of Mississippi warrants are unclaimed and presumed abandoned, the State Treasurer shall transfer such funds out of the Abandoned Property Fund established by Section 89-12-37 to the original fund source after the expiration of five (5) years as required herein.

SOURCES: Laws, 1991, ch. 451, § 7; Laws, 1992, ch. 408, § 1; Laws, 2000, ch. 501, § 2, eff from and after passage (approved Apr. 27, 2000).

ATTORNEY GENERAL OPINIONS

Unclaimed and unidentifiable funds in district attorney's pre-trial intervention account are unclaimed property to be disposed of under statute, involving report to State Treasurer, publication of names of persons appearing to own property, and payment of property to State Treasurer. Pacific, Dec. 16, 1992, A.G. Op. #92-0912.

Money or intangible property, which was subject of forfeiture proceedings which did not take place promptly, could be presumed "abandoned" under Miss. Code Section 89-12-14. Magee, Jan. 8, 1993, A.G. Op. #92-0909.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

§ 89-12-15. Presumed abandonment of intangible personal property held in ordinary course of holder's business.

All intangible personal property not otherwise covered by the provisions of this chapter, including any income or increment thereon and deducting any charges that may have accrued, that is held in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five (5) years after it became payable or distributable shall be presumed abandoned.

SOURCES: Laws, 1982, ch. 497, § 8; Laws, 1991, ch. 451, § 8, eff from and after July 1, 1991.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

Young, Trial Handbook for Mississippi Lawyers § 19:19.

CJS. 30A C.J.S., Escheat §§ 1, 3, 15.

§ 89-12-16. Presumed abandonment of tangible personal property or intangible personal property held by federal government, federal agency, or any officer or appointee thereof.

(1) All tangible personal property or intangible personal property, including choses in action in amounts certain, and all debts owed or entrusted funds or other property held by the federal government, or any federal agency, or any officer, or appointee thereof, shall be presumed abandoned in this state if the last known address of the owner of the property is in this state and the property has remained unclaimed for five (5) years.

(2) This section shall apply to all abandoned property held by the federal government, or any federal agency, or any officer, or any appointee thereof, on July 1, 1991, or at any time thereafter, regardless of when such property became presumptively abandoned.

SOURCES: Laws, 1991, ch. 451, § 9, eff from and after July 1, 1991.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

§ 89-12-17. Additional conditions for presumption of abandonment of intangible personal property.

Unless otherwise provided by statute of this state, intangible personal property shall be presumed abandoned under the provisions of this chapter if the conditions for presumption of abandonment stated in the provisions of this chapter exist, and if:

(a) The last-known address of the apparent owner is in this state as shown on the records of the holder; or

(b) No address of the apparent owner appears on the records of the holder, and

(i) The last-known address of the apparent owner is in this state, or

(ii) The holder is domiciled in this state and has not previously paid the property to the state of the last-known address of the apparent owner, or

(iii) The holder is a government or governmental subdivision or agency of this state and has not previously paid the property to the state of the last-known address of the apparent owner; or

(c) The last-known address of the apparent owner, as shown on the records of the holder, is in a state designated by regulation adopted by the treasurer as a state that does not provide by law for presumption of abandonment or escheat of such property and the holder is

(i) Domiciled in this state, or

(ii) A government or governmental subdivision or agency of this state; or

(d) The last-known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is

(i) Domiciled in this state, or

(ii) A government or governmental subdivision or agency of this state.

SOURCES: Laws, 1982, ch. 497, § 9, eff from and after July 1, 1982.

Cross References — Application of this section to presumed abandonment of property held or owing by bank or other business association, see § 89-12-5.

Application of this section to presumed abandonment of unclaimed funds held or owing by life insurance corporation, see § 89-12-7.

Application of this section to presumed abandonment of funds held or owing by utility, see § 89-12-9.

Application of this section to presumed abandonment of dividend, interest and the like held or owing by business association for stockholder, bondholder and the like, see § 89-12-11.

Application of this section to presumed abandonment of intangible personal property held by fiduciary, see § 89-12-13.

Recovery by another state of property paid or delivered to treasurer under this chapter, see § 89-12-21.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

§ 89-12-19. Additional conditions for presumption of abandonment of sum payable on money order, traveler's check and the like.

Any sum payable on a money order, traveler's check, or other similar written instrument (other than a third-party bank check) on which a business association is directly liable shall be presumed abandoned under the provisions of this chapter if the conditions for presumption of abandonment stated in Section 89-12-5 exist and if:

(a) The books and records of such business association show that such money order, traveler's check, or similar written instrument was purchased in this state;

(b) The business association has its principal place of business in this state, and the books and records of the business association do not show the state in which such money order, traveler's check, or similar written instrument was purchased; or

(c) The business association has its principal place of business in this state, the books and records of the business association show the state in which such money order, traveler's check, or similar written instrument was purchased, and the laws of the state of purchase do not provide for presumption of abandonment or escheat of the sum payable on such instrument.

SOURCES: Laws, 1982, ch. 497, § 10, eff from and after July 1, 1982.

Cross References — Recovery by another state of property paid or delivered to treasurer under this chapter, see § 89-12-21.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost and Unclaimed Property, Form 1.1 (complaint, petition, or declaration-allegation-property as subject to abandonment); Form 1.2 (allegation-relinquishment of possession to property); Form 1.3 (allegation-intent to abandon property); Form 1.4 (allegation-intent to abandon property-as voluntary and unconditional).

§ 89-12-21. Recovery by another state of property paid or delivered to treasurer under this chapter.

(1) At any time after property has been paid or delivered to the treasurer under the provisions of this chapter, another state shall be entitled to recover the property if:

(a) The property was presumed abandoned in this state under the provisions of paragraph (b) of Section 89-12-17 because no address of the apparent owner of the property appeared on the records of the holder when the property was presumed abandoned under the provisions of this chapter, the last-known address of the apparent owner was, in fact, in such other state, and, under the laws of that state, the property was presumed abandoned in or escheated to that state;

(b) The last-known address of the apparent owner of the property appearing on the records of the holder is in such other state and, under the laws of that state, the property was presumed abandoned in or escheated to that state;

(c) The property is the sum payable on a traveler's check, money order, or other similar instrument that was presumed abandoned in this state under the provisions of Section 89-12-19, the traveler's check, money order or other similar instrument was, in fact, purchased in such other state, and, under the laws of that state, the property was presumed abandoned in or escheated to that state; or

(d) The property is funds held or owing by a life insurance corporation that was presumed abandoned in this state by application of the presumption provided by subsection (2) of Section 89-12-7, the last-known address of the person entitled to the funds was, in fact, in such other state, and, under the laws of that state, the property was presumed abandoned in or escheated to that state.

(2) The claim of another state under this section to recover property shall be presented in writing to the treasurer, who shall consider the claim within ninety (90) days after it is presented. He may hold a hearing and receive evidence on such claim. He shall allow the claim if he determines that the other state is entitled to the property.

(3) Paragraphs (a) and (b) of subsection (1) shall not apply to property described in paragraph (c) or (d) of that subsection.

SOURCES: Laws, 1982, ch. 497, § 11, eff from and after July 1, 1982.

§ 89-12-23. Report to treasurer by holder of property presumed abandoned.

(1) Every person holding funds or other intangible personal property presumed abandoned under the provisions of this chapter shall report to the Treasurer with respect to the property as hereinafter provided.

(2) The report shall be verified, shall be on a form prescribed or approved by the Treasurer, and shall include:

(a) Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of more than One Hundred Dollars ($100.00) presumed abandoned under the provisions of this chapter;

(b) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(c) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under One Hundred Dollars ($100.00) each may be reported in aggregate;

(d) Except for any property reported in the aggregate, the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(e) Other information which the Treasurer prescribes by regulation as necessary for the administration of this chapter.

(3) If the person holding property presumed abandoned under the provisions of this chapter is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior-known names and addresses of each holder of the property.

(4) The report shall be filed annually through 1984, and reports shall be filed every third year thereafter. The report shall be filed before November 1 of each year in which a report is required as of June 30 next preceding. The Treasurer may postpone the reporting date upon written request by any person required to file a report.

(5) If the holder of property presumed abandoned under the provisions of this chapter knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the required report, endeavor to communicate with the owner and take reasonable steps to prevent abandonment from being presumed. The mailing of notice to the last-known address of the owner by the holder shall constitute compliance with this subsection and no further act on the part of the holder shall be necessary.

(6) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(7) Every person who is requested in writing by the Treasurer shall file a report stating that such person is not holding any abandoned property which is reportable pursuant to the provisions of this section.

(8) The initial report filed under this chapter shall include all items of property that would have been presumed abandoned if this chapter had been in effect since July 1, 1969, and all such property shall be subject to the provisions of this chapter.

SOURCES: Laws, 1982, ch. 497, § 12; Laws, 1991, ch. 451, § 10, eff from and after July 1, 1991.

Cross References — Mailed notice and published notice of names of persons appearing to own property presumed abandoned, see § 89-12-27.

Payment or delivery of abandoned property to treasurer, see § 89-12-29.

Discretion of treasurer to decline to receive property presumed abandoned, see § 89-12-43.

RESEARCH REFERENCES

CJS. 30A C.J.S., Escheat §§ 1-3, 15.

§ 89-12-25. Agreements to locate property presumed abandoned; prohibitions; approval.

(1) It is unlawful for a person to seek to receive from another person or contract with a person for a fee or compensation for locating property which he knows has been reported, paid or delivered to the Treasurer pursuant to the provisions of this chapter prior to seven (7) months after the date of payment or delivery of the property by the holder to the Treasurer as required by Section 89-12-29.

(2) The Treasurer shall approve all contracts entered into between two (2) or more persons whereby one (1) party to the contract agrees to furnish the other party with information concerning property reported to the Treasurer under this chapter. The agreed upon fee in such contracts shall not exceed ten percent (10%) of the value of the recoverable property or Fifty Dollars ($50.00), whichever is greater. Nothing in this section shall be construed to prevent an owner from asserting at any time that an agreement to locate property is based upon an excessive or unjust consideration.

SOURCES: Laws, 1982, ch. 497, § 13; Laws, 1991, ch. 451, § 11, eff from and after July 1, 1991.

§ 89-12-27. Published notice of names of persons appearing to own property presumed abandoned; mailed notice.

(1) Within one hundred twenty (120) days from the filing of the report required by Section 89-12-23, the Treasurer shall cause notice to be published in a newspaper having general circulation in the county of this state in which is located the last-known address of any person to be named in the notice. If no address is listed or if the address is outside this state, the notice shall be published in the county in which the holder of the abandoned property has his or her principal place of business in this state.

(2) The published notice shall be entitled "Notice of names of persons appearing to be owners of abandoned property," and shall contain:

(a) The names in alphabetical order and last-known addresses, if any, of persons listed in the report and entitled to notice in the county as specified in subsection (1) of this section;

(b) A statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the Treasurer; and

(c) A statement that any person claiming an interest in the property must file a proof of claim with the Treasurer as set forth in Section 89-12-39.

(3) The Treasurer shall not be required to publish in the notice any item of less than One Hundred Dollars ($100.00) unless he deems publication to be in the public interest.

(4) Within one hundred twenty (120) days from the receipt of the report required by Section 89-12-23, the Treasurer shall mail a notice to each person having an address listed therein who appears to be entitled to property valued at One Hundred Dollars ($100.00) or more and presumed abandoned under the provisions of this chapter.

(5) The mailed notice shall contain:

(a) A statement that property is being held to which the addressee appears entitled;

(b) A statement that any person claiming an interest in the property must file a proof of claim with the Treasurer as set forth in Section 89-12-39.

(6) This section shall not be applicable to sums payable on traveler's checks or money orders presumed abandoned under the provisions of Section 89-12-5.

SOURCES: Laws, 1982, ch. 497, § 14; Laws, 1983, ch. 478; Laws, 1993, ch. 460, § 1, eff from and after July 1, 1993.

Cross References — Procedures for disposition of funds of medicaid patients in long-term care facilities who die intestate and without heirs, see § 43-13-120.

Payment or delivery of abandoned property to treasurer, see § 89-12-29.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 48.

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost, and Unclaimed Property, Forms 11 et seq. (rights and duties of finder).

1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost, and Unclaimed Property, Form 41 (complaint, petition, or declaration-against finder-for failure to give notice of finding).

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Form 4 (notice of names of apparent owners of unclaimed bank deposits).

§ 89-12-29. Payment or delivery of abandoned property to treasurer.

(1) Except as otherwise provided in subsection (2) of this section, a person who is required to file a report under Section 89-12-23 shall pay or deliver to the Treasurer all abandoned property together with the report.

(2) If the owner established the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered, or it

appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the Treasurer, and the property is no longer presumed abandoned.

(3) The holder of an interest under Section 89-12-11 shall deliver a duplicate certificate or other evidence of ownership, if the holder does not issue certificates of ownership, to the Treasurer. Upon delivery of a duplicate certificate to the Treasurer, the holder and any transfer agent, registrar or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate, is relieved of all liability of every kind in accordance with the provisions of Section 89-12-31 to every person, including any person acquiring the original certificate of the duplicate of the certificate issued to the Treasurer, for any losses or damages resulting to any person by the issuance and delivery to the Treasurer of the duplicate certificate.

SOURCES: Laws, 1982, ch. 497, § 15; Laws, 1993, ch. 460, § 2, eff from and after July 1, 1993.

§ 89-12-30. Sale of securities listed on stock exchange.

(1) Securities listed on an established stock exchange must be sold at prices prevailing at the time of sale on the exchange. Other securities may be sold over the counter at prices prevailing at the time of sale or by any other method the Treasurer considers advisable.

(2) Unless the Treasurer considers it to be in the best interests of the state to do otherwise, all securities presumed abandoned under Section 89-12-11 and delivered to the Treasurer must be held for at least three (3) years before they may be sold. If the Treasurer sells any securities delivered pursuant to Section 89-12-11 before the expiration of the three-year period, any person making a claim pursuant to this chapter before the end of that time period is entitled to either the proceeds of the sale of the securities or the market value of the securities at the time the claim is made, whichever amount is greater. A person making a claim under this chapter after the expiration of the time period is entitled to receive either the securities delivered to the Treasurer by the holder, if they still remain in the hands of the Treasurer, or the proceeds received from sale, but no person has any claim under this chapter against the state, the holder, any transfer agent, registrar or other person acting for or on behalf of a holder for any appreciation in the value of the property occurring after delivery by the holder to the Treasurer.

(3) The purchaser of property at any sale conducted by the Treasurer pursuant to this chapter takes the property free of all claims of the owner or previous holder thereof and of all persons claiming through or under them. The Treasurer shall execute all documents necessary to complete the transfer of ownership.

SOURCES: Laws, 1991, ch. 451, § 14, eff from and after July 1, 1991.

§ 89-12-31. Holder relieved from liability upon payment or delivery of abandoned property to treasurer.

(1) Upon the payment or delivery of property to the Treasurer, the state assumes custody and responsibility for the safekeeping of the property. A person who pays or delivers property to the Treasurer in good faith is relieved of all liability for any claim then existing or which may arise or be made in respect to the property.

(2) If the holder pays or delivers property to the Treasurer in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the Treasurer, upon written notice of claim, shall defend the holder against any liability on the claim.

(3) The holder of an interest under Section 89-12-11 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificate of ownership to the administrator.

(4) Any holder who has paid moneys to the Treasurer pursuant to the provisions of this chapter may make payment to any person appearing to such holder to be entitled thereto and, upon proof of such payment and proof that the payee was entitled thereto, the Treasurer shall forthwith reimburse the holder for the payment.

SOURCES: Laws, 1982, ch. 497, § 16; Laws, 1991, ch. 451, § 12, eff from and after July 1, 1991.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost, and Unclaimed Property, Form 31 (petition or application-by finder-to deliver unclaimed or abandoned property to public officer and relieve finder of responsibility to owner).

§ 89-12-33. Owner entitled to further income or increments.

When property other than money is paid or delivered to the Treasurer under this chapter, the owner is entitled to receive from the Treasurer any dividends, interest or other increments realized or accruing on the property at or before liquidation or conversion into money.

SOURCES: Laws, 1982, ch. 497, § 17; Laws, 1991, ch. 451, § 13, eff from and after July 1, 1991.

§ 89-12-35. Effect of expiration of period of limitation.

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by the provisions of this chapter, or to pay or deliver abandoned property to the treasurer.

SOURCES: Laws, 1982, ch. 497, § 18, eff from and after July 1, 1982.

JUDICIAL DECISIONS

1. In general.

Section 89-12-35 of the Uniform Disposition of Unclaimed Property Act did not apply retroactively to lift the bar of the statute of limitations regarding the reporting and payment of funds held by an insurance company as "abandoned property." Cole v. National Life Ins. Co., 549 So. 2d 1301 (Miss. 1989).

§ 89-12-37. Abandoned property fund; abandoned property claims payment fund.

(1) All funds received under the provisions of this chapter shall forthwith be deposited by the Treasurer in a special fund hereby established in the State Treasury to be designated the "Abandoned Property Fund," except that the Treasurer shall deposit in a separate special fund hereby established in the State Treasury to be designated the "Abandoned Property Claims Payment Fund" an amount not exceeding One Hundred Fifty Thousand Dollars ($150,000.00) from which he shall make prompt payment of claims duly allowed by him as hereinafter provided. Before making the deposits in either special fund, he shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and the name and last known address of each insured person or annuitant and, with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation and the amount due. The record shall be available for public inspection at all reasonable business hours.

(2) There is created within the Abandoned Property Fund in the State Treasury a trust to be known as the Historic Properties Financing Fund, which shall be used as provided in this section. On July 1, 1999, Ten Million Dollars ($10,000,000.00) in the Abandoned Property Fund shall be set aside and placed in the Historic Properties Financing Fund created herein. The principal of the Historic Properties Financing Fund shall remain inviolate within the Abandoned Property Fund, and shall be invested in the same manner as the remainder of the Abandoned Property Fund. The interest and income earned from the investment of the principal of the Historic Properties Financing Fund shall be transferred quarterly to the Mississippi Landmark Grant Program account within the Historic Properties Trust Fund created under Section 39-5-23. The transferred money shall be utilized by the Department of Archives and History for the purposes as specified in Section 39-5-23(3).

(3) Notwithstanding subsections (1) and (2) of this section, the funds reflected by the cancellation of State of Mississippi warrants that constitute part of the Abandoned Property Fund shall be transferred by the State Treasurer back to the original fund source if unclaimed by the owner within the time specified in Section 7-7-42.

SOURCES: Laws, 1982, ch. 497, § 19; Laws, 1999, ch. 486, § 2; Laws, 2000, ch. 501, § 3, eff from and after passage (approved Apr. 27, 2000).

§ 89-12-39. Claim for abandoned property paid or delivered to treasurer; determination; interest.

(1) Any person claiming an interest in any property delivered to the state under the provisions of this chapter may file a claim on the form prescribed by the Treasurer.

(2) The Treasurer shall consider any claim filed under the provisions of subsection (1) of this section, and may hold a hearing and receive evidence concerning it. If a hearing is held, he shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard by him and the reasons for his decision. The decision shall be a public record.

(3) If the validity of a claim shall be determined in favor of the claimant, the Treasurer shall pay over to the claimant only that amount which the Treasurer actually received, without deduction for costs of notices or for service charges, together with interest at the rate of one-twelfth of one percent (1/12 of 1%) per month from the time when it was received by the Treasurer to the time when it was paid by him to the claimant. However, if the property claimed was interest bearing to the owner on the date of surrender by the holder, then the Treasurer shall instead add interest at a rate not to exceed five-twelfths of one percent (5/12 of 1%) per month or the lesser current market rate. The interest on interest-bearing property shall begin to accumulate on the date that the property is delivered to the Treasurer and shall cease on the earlier of the expiration of fifteen (15) years following delivery or the date on which payment is made to the owner. No interest on the interest-bearing property shall be payable for any period prior to July 1, 1982. Any holder who pays to the owner property which has been delivered to the state and which, if claimed from the Treasurer, would be subject to the provisions of this section as interest-bearing property, shall add interest as provided in this section. The added interest shall be repaid to the holder by the Treasurer in the same manner as the principal.

SOURCES: Laws, 1982, ch. 497, § 20; Laws, 1993, ch. 460, § 3, eff from and after July 1, 1993.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property § 36.

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 31 et seq. (administrative proceedings for recovery of property).

CJS. 30A C.J.S., Escheat § 7, 8.

§ 89-12-41. Judicial review of action of treasurer upon claim.

Any person aggrieved by a decision of the treasurer or as to whose claim the treasurer has failed to act within ninety (90) days after the filing of the claim, may commence an action in the Circuit Court of the First Judicial District of Hinds County, Mississippi, to establish his claim. The proceeding shall be brought within thirty (30) days after the decision of the treasurer or within sixty (60) days from the filing of the claim if the treasurer fails to act.

SOURCES: Laws, 1982, ch. 497, § 21, eff from and after July 1, 1982.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. Pl & Pr Forms (Rev), Abandoned, Lost, and Unclaimed Property, Form 1 (complaint, petition, or declaration for determination of claims to abandoned personal property); Form 4 (instruction to jury as to elements of abandonment).

9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 42 et seq. (judicial proceedings for recovery of property).

§ 89-12-43. Treasurer may decline to receive property presumed abandoned.

The treasurer, after receiving reports of property deemed abandoned pursuant to the provisions of this chapter, may decline to receive any property reported which he deems to have a value less than the cost of giving notice, or he may, if he deems it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within thirty (30) days after filing the report required under Section 89-12-23, the treasurer shall be deemed to have elected to receive the custody of the property.

SOURCES: Laws, 1982, ch. 497, § 22, eff from and after July 1, 1982.

§ 89-12-45. Examination of records by treasurer or designated regulatory authority.

(1) The Treasurer may at reasonable times and upon reasonable notice examine the records of any person to determine if such person has complied with the provisions of this chapter. The Treasurer may designate the Commissioner of Banking and Consumer Finance or other appropriate regulatory authority to examine the records of institutions of regulated industries to determine if such institutions have complied with the provisions of this chapter.

(2) If, in connection with such examination, property which should have been reported pursuant to the provisions of this chapter is discovered, the holder shall pay a per diem rate equal to actual costs per examination as the cost of conducting the examination.

(3) If any person refuses to permit the examination provided in this section or to deliver property to the Treasurer as required under the provisions of this chapter, the Treasurer shall bring an action in a court of appropriate jurisdiction to compel such examination or to enforce such delivery.

SOURCES: Laws, 1982, ch. 497, § 23; Laws, 1994, ch. 622, § 161, eff from and after July 1, 1994.

§ 89-12-47. Penalties for failure to make reports or to pay or deliver abandoned property.

(1) Any person who willfully fails to render any report or perform other duties required under the provisions of this chapter shall, upon conviction thereof, be punished by a fine of Five Dollars ($5.00) for each day the report is withheld, but not more than One Hundred Dollars ($100.00).

(2) Any person who willfully refuses to pay or deliver abandoned property to the Treasurer as required under the provisions of this chapter shall, upon conviction thereof, be punished by a fine of not less than Five Dollars ($5.00) nor more than One Hundred Dollars ($100.00), or imprisonment for not more than six (6) months, or both, in the discretion of the court.

(3) In addition to any damages, penalties, or fines for which a person may be liable under any other provision of law, any person who fails to report, pay or deliver abandoned property within the time prescribed by the provisions of this chapter shall pay to the Treasurer interest at the rate of one percent (1%) per month on the property or the value thereof from the date the property should have been paid or delivered, but in no event prior to July 1, 1982; except that if the failure to report, pay or deliver is the result of mistake or other good cause shown, the Treasurer may reduce the rate of interest or waive the interest payable thereon.

SOURCES: Laws, 1982, ch. 497, § 24; Laws, 1993, ch. 460, § 4, eff from and after July 1, 1993.

§ 89-12-49. Rules and regulations.

The treasurer is hereby authorized to adopt necessary rules and regulations to carry out the provisions of this chapter.

SOURCES: Laws, 1982, ch. 497, § 25, eff from and after July 1, 1982.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. Proof of Facts 2d 685, Abandonment of Tangible Personal Property.

§ 89-12-51. Repealed.

Repealed by Laws, 1992, ch. 408, § 2, eff from and after July 1, 1992. [Laws, 1982, ch. 497, § 27; Laws 1985, ch. 403, § 2]

Editor's Note — Former Section 89-12-51 provided that the Uniform Disposition of Unclaimed Property Act (§§ 89-12-1 et seq.) did not apply to property presumed abandoned under the laws of another state before July 1, 1982.

§ 89-12-53. Chapter inapplicable to property of minor or incompetent.

The provisions of this chapter shall not apply to any person who is the owner of any type of property described herein where such person is either a minor or mentally incompetent, nor to any person who is the owner of any type of property described herein which is subject to the provisions of Section 43-13-120.

SOURCES: Laws, 1982, ch. 497, § 27; Laws, 1985, ch. 403, § 2, eff from and after passage (approved March 25, 1985).

§ 89-12-55. Uniformity of interpretation.

This chapter shall be so construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

SOURCES: Laws, 1982, ch. 497, § 28, eff from and after July 1, 1982.

§ 89-12-57. Provisions of chapter supplemental to Section 21-39-21.

This chapter shall not be construed as repealing the provisions of Section 21-39-21, but shall be additional and supplemental to those provisions.

SOURCES: Laws, 1982, ch. 497, § 29, eff from and after July 1, 1982.

CHAPTER 13

Party Fences

Sec.
89-13-1. Adjoining owners to contribute.
89-13-3. Enforcement of contribution.
89-13-5. Enforcement of contribution; notice and proceedings.
89-13-7. Enforcement of contribution; action for amount assessed.
89-13-9. Enforcement of contribution; costs.
89-13-11. Contribution where fence already built.
89-13-13. Contribution to keep fence in repair.
89-13-15. Ownership of party fence; fence not to be removed.
89-13-17. Departure from line.
89-13-19. Removal and abandonment of party fence.
89-13-21. Sale of land; lessee or owner to contribute.
89-13-23. Fence removed if not paid for, and adopted by paying proportion of value.

§ 89-13-1. Adjoining owners to contribute.

Persons owning adjoining land or lots, or being lessees thereof for more than two (2) years, shall be bound to contribute equally to the erection of fences on the line dividing the land or lots, if the land or lots on their respective sides be used by the owner or lessee thereof for purposes of cultivation, or for horticultural purposes, or for the purpose of pasturing cattle, horses, hogs or sheep, or if a lot be used as an inclosure for any other purpose; and each party shall be bound to contribute equally toward keeping the party fences in good repair so long as the land or lot be so used. An owner shall not be bound to contribute to the erection of a party fence, either built or to be built, or to keeping the same in repair, who may prefer to build a fence and to leave a lane on his land between himself and the adjoining owner. But the failure to erect such fence for the space of sixty (60) days shall be deemed an abandonment of the intention to do so, and a determination to adopt the fence built, and the person so failing shall then be bound to pay his proportion of the value of the party fence.

SOURCES: Codes, Hutchinson's 1848, ch. 12, art. 6 (4); 1857, ch. 16, art. 2; 1871, § 1908; 1880, § 971; 1892, § 3126; 1906, § 3549; Hemingway's 1917, § 2866; 1930, § 5676; 1942, § 989.

Cross References — Party walls generally, see §§ 89-15-1 et seq.

JUDICIAL DECISIONS

1. In general.

A yard fence erected along the line of a city lot by one of the adjoining landowner's predecessors in title, without any contribution from the other adjoining landowner or his predecessor in title, was not a party fence. Hunter v. Williams, 230 Miss. 72, 92 So. 2d 367 (1957).

Making of slight repairs on fence by adjoining landowner and giving of notice not to interfere would not constitute such fence a "party fence." Evans v. State, 159 Miss. 870, 132 So. 455 (1931).

That adjoining landowners may have owned land by adverse possession up to fence would not of itself constitute such fence a "party fence." Evans v. State, 159 Miss. 870, 132 So. 455 (1931).

Line fence does not become "party fence" unless provisions of statute are complied with so that each party owns interest in adjoining land and fence. Evans v. State, 159 Miss. 870, 132 So. 455 (1931).

An agreement between adjoining owners for the construction of a dividing line fence at the cost of both is not within the statute of frauds. Berry v. Jones, 106 Miss. 115, 63 So. 341 (1913).

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences §§ 6 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Ejectment, Form 42.1 (complaint, petition, or declaration-for recovery of possession-fence built by adjoining landowner on plaintiff's property).

8A Am. Jur. Legal Forms 2d, Fences §§ 114:10 et seq. (agreements affecting the construction and maintenance of fences).

CJS. 36A C.J.S., Fences §§ 2 et seq.

§ 89-13-3. Enforcement of contribution.

If any person, being requested to do so, will not contribute his proper share of the work and furnish the requisite materials suitable for a party fence, or pay the value of his share, the person desiring to build the fence may erect or construct the whole of it, of a proper and suitable kind, being a lawful fence, and may thereafter apply, in writing, to a justice of the peace, who shall appoint three (3) impartial freeholders of the neighborhood to view the fence and determine what amount should be paid by the person who has failed to contribute.

SOURCES: Codes, Hutchinson's 1848, ch. 12, art. 6 (4); 1857, ch. 16, art. 3; 1871, § 1909; 1880, § 972; 1892, § 3127; 1906, § 3550; Hemingway's 1917, § 2867; 1930, § 5677; 1942, § 990.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

Cross References — Ascertainment of sum to be paid for use of party wall, see § 89-15-5.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences §§ 12, 19, 20.

12 Am. Jur. Pl & Pr Forms (Rev), Fences, Form 2 (demand on adjoining owner to pay share of cost of maintaining partition fence); Form 5 (complaint, petition, or declaration for cost of repairing half of partition or division fence).

CJS. 36A C.J.S., Fences §§ 29-31.

§ 89-13-5. Enforcement of contribution; notice and proceedings.

The opposite party shall have five (5) days' notice of the time of the meeting of the freeholders, which may be served as a summons is required to be, and each party may introduce evidence of the value of the fence; and the freeholders, or a majority of them, may assess the amount to be paid by the one party to the other, and shall give to the party entitled to the compensation a certificate stating the amount they assess in his favor.

SOURCES: Codes, Hutchinson's 1848, ch. 12, art. 6 (4); 1857, ch. 16, art. 3; 1871, § 1909; 1880, § 972; 1892, § 3128; 1906, § 3551; Hemingway's 1917, § 2868; 1930, § 5678; 1942, § 991.

Cross References — Appointment of appraisers to assess value of party wall, see § 89-15-5.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences §§ 21 et seq.

12 Am. Jur. Pl & Pr Forms (Rev), Fences, Form 24 (notice to landowners of meeting of fence viewers); Forms 27, 28 (certificate or report of fence viewers).

CJS. 36A C.J.S., Fences §§ 31 et seq.

§ 89-13-7. Enforcement of contribution; action for amount assessed.

The party may maintain an action for the amount assessed by the freeholders; and the order of the justice appointing the freeholders, and the certificate of the freeholders, and proof of notice to the opposite party of the time of the meeting, shall be prima facie evidence to support the action. The amount recovered shall be a lien upon the land or lot of the defendant.

SOURCES: Codes, 1857, ch. 16, art. 3; 1871, § 1909; 1880, § 972; 1892, § 3129; 1906, § 3552; Hemingway's 1917, § 2869; 1930, § 5679; 1942, § 992.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences § 20.

CJS. 36A C.J.S., Fences §§ 31.

§ 89-13-9. Enforcement of contribution; costs.

The freeholders each shall receive One Dollar and Fifty Cents ($1.50) per day whilst discharging their duty, to be paid by the party at whose instance they were appointed, who may recover the amount as costs, and the justice shall be entitled to fees as in other cases.

SOURCES: Codes, 1857, ch. 16, art. 3; 1871, § 1909; 1880, § 972; 1892, § 3130; 1906, § 3553; Hemingway's 1917, § 2870; 1930, § 5680; 1942, § 993.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences § 30.

§ 89-13-11. Contribution where fence already built.

In case any party fence has been already built, and the adjoining land be used by the owner thereof for any of the purposes set forth in Section 89-17-1, the party who built the same shall in like manner be entitled to compensation, to the extent that ought to be contributed by the owner of the adjoining land, and in case of refusal to pay the same, the amount may be assessed and a recovery had in the same manner as for erecting a new fence.

SOURCES: Codes, 1857, ch. 16, art. 4; 1871, § 1910; 1880, § 973; 1892, § 3131; 1906, § 3554; Hemingway's 1917, § 2871; 1930, § 5681; 1942, § 994.

§ 89-13-13. Contribution to keep fence in repair.

Each proprietor of land or lots separated by a party fence, shall be bound to contribute his due proportion of labor and materials for keeping the fence in good repair, so far as to make it a lawful fence; and contributions for that purpose may be enforced as above provided.

SOURCES: Codes, 1857, ch. 16, art. 5; 1871, § 1911; 1880, § 974; 1892, § 3132; 1906, § 3555; Hemingway's 1917, § 2872; 1930, § 5682; 1942, § 995.

§ 89-13-15. Ownership of party fence; fence not to be removed.

A party fence will be owned jointly by the respective proprietors, either of whom may require the other to contribute to repairing it, but it shall not be taken away, razed, removed, or left down by either party without the consent of the other; and if either party violate this provision, he shall be liable to the action of the other, and be subject to such penalties as a stranger would be. However, a party shall not be bound to contribute towards keeping a party fence in repair, after he shall have ceased to use the land which is divided by it.

SOURCES: Codes, 1857, ch. 16, art. 6; 1871, § 1912; 1880, § 975; 1892, § 3133; 1906, § 3556; Hemingway's 1917, § 2873; 1930, § 5683; 1942, § 996.

Cross References — Prohibition against removal or impairment in value of party wall, see § 89-15-11.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. Pl & Pr Forms (Rev), Fences, Forms 42 et seq. (complaint, petition, or declaration for damages for destruction of fence and for other relief); Form 51 (instruction to jury as to measure of damages for destruction of or damage to fence).

CJS. 36A C.J.S., Fences §§ 10, 11 et seq.

§ 89-13-17. Departure from line.

When, from natural obstacles, it shall be impracticable to erect the entire fence on the dividing line, and it be necessary to make a departure on either side, such departure may be made, but the fence shall, notwithstanding, be a party fence.

SOURCES: Codes, 1857, ch. 16, art. 7; 1871, § 1913; 1880, § 976; 1892, § 3134; 1906, § 3557; Hemingway's 1917, § 2874; 1930, § 5684; 1942, § 997.

RESEARCH REFERENCES

CJS. 36A C.J.S., Fences §§ 5-7.

§ 89-13-19. Removal and abandonment of party fence.

In case a joint-owner of a party fence shall desire to have a lane on his land, between his own and the adjoining land, he shall be at liberty to remove his part of the fence, on giving six (6) months' notice to the other joint-owner, and not otherwise; but any proprietor who may remove from his land, and cease to use it for any of the purposes before mentioned, shall thereby abandon his right to the party fence.

SOURCES: Codes, 1857, ch. 16, art. 8; 1871, § 1914; 1880, § 977; 1892, § 3135; 1906, § 3558; Hemingway's 1917, § 2875; 1930, § 5685; 1942, § 998.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences § 17.

CJS. 36A C.J.S., Fences § 27.

§ 89-13-21. Sale of land; lessee or owner to contribute.

In case of the sale of the premises to another person, the purchaser shall have the same right and incur the same liabilities as the original owner, in regard to the party fence. A lessee for a longer time than two (2) years shall stand in the attitude of a purchaser during his term; but if the lease be for two (2) years, or a shorter time, the owner shall be bound to contribute towards the erection and repair of the party fence, if either the owner or the tenant use the land; and in such case, the notice served on the tenant, if the owner be absent, will be sufficient.

SOURCES: Codes, 1857, ch. 16, art. 8; 1871, § 1914; 1880, § 977; 1892, § 3136; 1906, § 3559; Hemingway's 1917, § 2876; 1930, § 5686; 1942, § 999.

RESEARCH REFERENCES

Am Jur. 35A Am. Jur. 2d, Fences § 12. **CJS.** 36A C.J.S., Fences §§ 29, 30.

§ 89-13-23. Fence removed if not paid for, and adopted by paying proportion of value.

The person who built the party fence may remove it at pleasure, if the owner of the adjoining land will not pay his proportion thereof; and although the proprietor of any land may desire to retain any fence built by him on a line which divides his land from that of another person, as a private fence, yet that other person may adopt the same as a party fence by paying his proportion of the value thereof; and if the value cannot be agreed upon by the parties, the person desiring to adopt the fence may apply to a justice of the peace to appoint freeholders to assess the proportion that should be paid, as in other cases.

SOURCES: Codes, 1857, ch. 16, art. 9; 1871, § 1915; 1880, § 978; 1892, § 3137; 1906, § 3560; Hemingway's 1917, § 2877; 1930, § 5687; 1942, § 1000.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

CHAPTER 15

Party Walls

Sec.	
89-15-1.	Parol agreement concerning, binding.
89-15-3.	How wall may become a party wall.
89-15-5.	Wall not to be used until paid for; how sum ascertained.
89-15-7.	Exceptions to appraisers.
89-15-9.	Either party may appeal; final record.
89-15-11.	Party wall not to be removed or impaired in value.

§ 89-15-1. Parol agreement concerning, binding.

Any agreement for erecting walls which parties may make who own adjoining lots and desire to build party walls, shall be binding, whether in writing or not; and in case of the failure of either party to comply with his contract, the other may have an action for damages.

SOURCES: Codes, 1857, ch. 16, art. 10; 1871, § 1916; 1880, § 979; 1892, § 3138; 1906, § 3561; Hemingway's 1917, § 2883; 1930, § 5688; 1942, § 1001.

Cross References — Contracts required to be in writing, see § 15-3-1.

Party fences, see §§ 89-13-1 et seq.

JUDICIAL DECISIONS

1. In general.

It is not a valid objection to the reconstruction of a party wall, weakened by fire, that one of the parties will be inconvenienced by the construction, or that the wall as it stood was sufficient for such party's own use. Lexington Lodge v. Beall, 94 Miss. 521, 49 So. 833 (1909).

Each purchaser of either lot on which a party wall has been placed, has the right to assume that any compensation as between their vendors has been paid. Mayer v. Martin, 83 Miss. 322, 35 So. 218 (1903).

The verbal agreement of a lot owner to pay one-half of the cost of a wall to be built by an adjoining owner does not run with the land and is not enforceable by the vendee of such adjoining owner. Mayer v. Martin, 83 Miss. 322, 35 So. 218 (1903).

A wall built upon a dividing line of two separate proprietors, partly on the land of each, is a party wall, which means a solid wall, and one of the proprietors has no right to cut windows in such wall above the roof of the other. Weems v. Mayfield, 75 Miss. 286, 22 So. 892 (1898).

A verbal agreement between two proprietors that a division wall, built partly upon the land of each, shall be the sole property of one of them is void under Code 1892, § 2434 [Code 1942, § 832]. Weems v. Mayfield, 75 Miss. 286, 22 So. 892 (1898).

Because of the writing a contemporaneous parol agreement by such grantor to build a wall cannot be shown. Money v. Peavy, 70 Miss. 260, 12 So. 334 (1892).

To recite in a deed as a part of the consideration, that the vendees or any subsequent owner of the land conveyed, "shall have the right of uniting with and using the south wall which may be erected thereon" is not to stipulate that the wall shall or will be built, and the grantors are not liable in damages for failure to erect one. Money v. Peavy, 70 Miss. 260, 12 So. 334 (1892).

This section [Code 1942, § 1001] authorizes verbal contracts between persons who own adjacent lots for erecting partition walls and does not apply to contracts whereby parties are negotiating to become such owners. Money v. Peavy, 70 Miss. 260, 12 So. 334 (1892).

RESEARCH REFERENCES

Am Jur. 59A Am. Jur. 2d, Party Walls § 6.

14B Am. Jur. Legal Forms 2d, Party Walls, §§ 195:20 et seq. (creation of party wall interests in existing walls).

CJS. 69 C.J.S., Party Walls § 7.

§ 89-15-3. How wall may become a party wall.

If the owner of any lot shall build a substantial and durable brick or stone wall on the line which divides his lot from another, and the owner or lessee of that other lot should desire to erect an adjoining building and connect the same with the building already erected, so as to make the wall of the former building serve as the wall of his own, he may do so by paying to the owner of the first wall half the value thereof, or half the value of so much of the former wall as he may use as a wall to his own house; but he shall not be at liberty to use the former wall in any way which may prove dangerous or detrimental to the owner, except he may close lights therein.

SOURCES: Codes, 1857, ch. 16, art. 11; 1871, § 1917; 1880, § 980; 1892, § 3139; 1906, § 3562; Hemingway's 1917, § 2884; 1930, § 5689; 1942, § 1002.

Cross References — Contributions for upkeep of party fences, see § 89-13-1.

JUDICIAL DECISIONS

1. In general.

One party in restoring and repairing party walls may do so on condition that he gives an adjoining house the same right of support that it had. Lexington Lodge v. Beall, 94 Miss. 521, 49 So. 833 (1909).

A joint owner of burned or injured party walls may be required to contribute his share to cost of repairing same. Howze v. Whitehead, 93 Miss. 578, 46 So. 401 (1908).

RESEARCH REFERENCES

ALR. Use of party wall for nonstructural purposes. 2 A.L.R.2d 1135.

Right to increase height of party wall. 24 A.L.R.2d 1053.

Am Jur. 59A Am. Jur. 2d, Party Walls §§ 7-10, 11-15, 40, 64.

19 Am. Jur. Pl & Pr Forms (Rev), Party Walls, Form 1 (complaint, petition, or declaration for contribution to cost of repair of party wall); Form 2 (complaint, petition, or declaration to determine rights in wall and for order enjoining defendant from damaging wall).

14BAm. Jur. Legal Forms 2d, Party Walls §§ 195:20 et seq. (creation of party wall interests in existing walls).

CJS. 69 C.J.S., Party Walls § 19.

§ 89-15-5. Wall not to be used until paid for; how sum ascertained.

A person shall not be at liberty to join or use a wall as a party-wall without first paying to the owner thereof one-half (½) the value of so much as may be used; and if the parties cannot agree as to the value, either may apply to the mayor, police justice of the city, town or village, or to any justice of the peace of the county, in writing, for the appointment of suitable persons to assess the amount to be paid; and such mayor or police justice or justice of the peace shall thereupon appoint three (3) mechanics skilled in the description of work, who, or a majority of whom, shall examine the wall, and assess the amount to be paid to the owner thereof, and give a certificate of such examination and assessment to the party at whose instance they were appointed. The opposite party shall have five (5) days' notice of the time of the meeting of the appraisers, and their names, which notice may be served as a summons is required by law to be served. On payment or tender of the amount assessed, the party desiring to use the wall may proceed to do so.

SOURCES: Codes, 1857, ch. 16, art. 12; 1871, § 1918; 1880, § 981; 1892, § 3140; 1906, § 3563; Hemingway's 1917, § 2885; 1930, § 5690; 1942, § 1003.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

Cross References — Party fences generally, see §§ 89-13-1 et seq.

Enforcement of contribution for maintenance of party fence, see § 89-13-3.

RESEARCH REFERENCES

Am Jur. 59A Am. Jur. 2d, Party Walls §§ 31, 36.

CJS. 69 C.J.S., Party Walls § 19.

§ 89-15-7. Exceptions to appraisers.

If either party present to such mayor or police justice or justice of the peace, within ten (10) days after filing of assessment, exceptions to any of the appraisers, and the mayor or police justice or justice of the peace be of the opinion that the exception is well founded, a new appraiser or appraisers may be appointed, and either party shall be at liberty to introduce evidence before the appraisers as to the value of the wall.

SOURCES: Codes, 1857, ch. 16, art. 13; 1871, § 1919; 1880, § 982; 1892, § 3141; 1906, § 3564; Hemingway's 1917, § 2886; 1930, § 5691; 1942, § 1004.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

§ 89-15-9. Either party may appeal; final record.

The officer so appointing the appraisers shall make and preserve a record of all proceedings as in other cases before him, which shall contain the report of the appraisers, which shall be final, unless appealed from within ten (10) days, as in cases appealed from justice of the peace courts. But either party desiring may appeal, as in other cases before justices of the peace, to the circuit court of the county or district, where the whole matters of difference between the parties shall be heard anew, with or without written pleadings, in a summary way, before a jury and the court, as in other cases appealed from justices of the peace, and the findings of the circuit court in the case shall be final. On the proper certificate from the proper officer of the court finally disposing of the case, either party interested may have the final record recorded in the record of deeds of the county or district thereof.

SOURCES: Codes, 1930, § 5692; 1942, § 1005.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to "justice of the peace" shall mean justice court judge.

RESEARCH REFERENCES

Am Jur. 59A Am. Jur. 2d, Party Walls §§ 65, 69-74, 77, 80-85.

§ 89-15-11. Party wall not to be removed or impaired in value.

Any party wall which has been paid for, and is used as such, shall not be removed by either party without the consent of the other; nor shall it be so damaged or altered as to render it less valuable to either. And if either party violate this provision he shall be liable to the other as a trespasser for all damages that may be sustained.

SOURCES: Codes, 1857, ch. 16, art. 14; 1871, § 1920; 1880, § 983; 1892, § 3142; 1906, § 3565; Hemingway's 1917, § 2887; 1930, § 5693; 1942, § 1006.

Cross References — Prohibition against removal of party fence, see § 89-13-15.

JUDICIAL DECISIONS

1. In general.

This chapter does not apply to an agreement for passageway and ventilation over a party wall. Binder v. Weinberg, 94 Miss. 817, 48 So. 1013 (1909).

RESEARCH REFERENCES

ALR. Use of party wall for nonstructural purposes. 2 A.L.R.2d 1135.

Right to increase height of party wall. 24 A.L.R.2d 1053.

Am Jur. 59A Am. Jur. 2d, Party Walls §§ 24, 25, 27, 39-42, 48, 51.

19 Am. Jur. Pl & Pr Forms (Rev), Party Walls, Form 2 (complaint, petition, or declaration to determine rights in wall and for order enjoining defendant from damaging wall); Form 6 (complaint, petition, or declaration against co-owner for damage to party wall).

CJS. 69 C.J.S., Party Walls §§ 16, 19, 23.

CHAPTER 17

Salvage

Sec.
89-17-1. Abandoned logs, boats, etc., salvaged.
89-17-3. Replevin by owner; bond; lien for salvage.
89-17-5. Prima facie abandonment.
89-17-7. Jurisdiction limited.
89-17-9. How claims for salvage service rendered shall be filed and prosecuted.
89-17-11. Clerk to issue summons.
89-17-13. How notice given where parties are nonresidents of state.
89-17-15. Procedure on return of writ; defendant to plead to petition in case of contest.
89-17-17. Sheriff to advertise property for sale; proceeds held for result of suit.
89-17-19. Failure of defendant to appear at return term; funds condemned to satisfy judgment.
89-17-21. Jurisdiction of justice courts; time for trial; notice to parties.
89-17-23. Person claiming property admitted to defend.
89-17-25. Penalty for converting derelict property to own use.
89-17-27. Unlawful to purchase derelict property from finder thereof.

§ 89-17-1. Abandoned logs, boats, etc., salvaged.

Any saw logs, sawn or hewn timber, lumber, boat, building, or other floatable thing of value that may have become derelict in any of the waters or watercourses of the state or in the beds thereof and which have been relinquished, deserted or left by the owner thereof with the intention of abandoning same shall become the property of the owner of the bed of the stream, or the part thereof, where such property may be found and such owner may raise, float or salve said property or authorize the raising, floating or salving of such property.

SOURCES: Codes, 1930, § 6523; 1942, § 1007; Laws, 1930, ch. 243.

Cross References — Lien for work done or materials supplied for watercraft, see § 85-7-7.

Contribution by owner of adjoining land where party fence already built and adjoining land used by owner for purposes set forth in this section, see § 89-13-11.

This section not applicable to the waters of the Mississippi Sound or Gulf of Mexico, see § 89-17-7.

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Abandoned, Lost, and Unclaimed Property §§ 23, 30-35.

52 Am. Jur. 2d, Logs and Timber §§ 87, 85, 88.

68 Am. Jur. 2d, Salvage §§ 2-4.

CJS. 1 C.J.S., Abandonment § 12.

54 C.J.S., Logs and Logging §§ 56, 57.

77A C.J.S., Salvage §§ 30-35.

§ 89-17-3. Replevin by owner; bond; lien for salvage.

Any person claiming to be the owner of such property may institute an action in replevin for the recovery of such property. Any bond given in such suit to obtain possession of said property shall be liable for any depreciation in value of the property between the date of the giving of the bond and final termination of the suit. If no bond be given by either party within seventy-two (72) hours after the seizure of the property under the writ, the sheriff on the written demand of either party shall sell the same for cash at public outcry after posting a notice of the time and place of sale at three (3) or more public places in the county. The proceeds of sale shall be paid into the registry of the court to await the final outcome of the suit. The defendant in such suit, in the event he or any person acting for him or with his consent has raised, floated or salvaged the property whose title or possession is in issue, shall be entitled to a lien on such property for the reasonable expense of raising, floating, or salvaging such property.

SOURCES: Codes, 1930, § 6524; 1942, § 1008; Laws, 1930, ch. 243.

Cross References — This section not applicable to the waters of the Mississippi Sound or Gulf of Mexico, see § 89-17-7.

§ 89-17-5. Prima facie abandonment.

In any suit brought by one claiming to be the owner of such property, proof that such property has been relinquished, deserted or left for a period of three (3) years thereafter without effort to salve such property shall be prima facie evidence of the intention to abandon.

SOURCES: Codes, 1930, § 6525; 1942, § 1009; Laws, 1930, ch. 243.

Cross References — This section not applicable to the waters of the Mississippi Sound or Gulf of Mexico, see § 89-17-7.

§ 89-17-7. Jurisdiction limited.

The following sections, and not the foregoing, shall apply to the waters of the Mississippi Sound or of the Gulf of Mexico within the jurisdiction and control of the State of Mississippi; provided that if the foregoing sections should be held unconstitutional, then the following sections shall apply to the entire state.

SOURCES: Codes, 1930, § 6526; 1942, § 1010; Laws, 1930, ch. 243.

§ 89-17-9. How claims for salvage service rendered shall be filed and prosecuted.

Whenever any person shall desire to claim compensation for any salvage service rendered by him in reclaiming and protecting from loss, damage, injury or destruction, any saw log, sawn or hewn timber, lumber, boat or other water craft, or other floatable thing of value, that may have become derelict, in any of the waters of this state or in the beds or on the shores thereof, or for compensation for the preservation thereof, such finder, salvor, or person raising or floating such property, shall file a petition for compensation in the circuit court of the county in which such property shall be found, raised or floated, or salved. In the petition he shall set forth a full and particular description of the property found, raised or floated, or salved, containing all names, letters or other marks of identification appearing thereon, and in the petition he shall also set forth the facts constituting his claim for compensation, and the amount claimed by him for such service, and shall also state the name of the owner of the property, if known to the petitioner, and his place of residence and post-office address. Said owner shall be made a party defendant thereto, and if the owner be unknown, all persons having or claiming any interest in the property shall be made parties defendant, and the petition shall be sworn to. Immediately upon the filing of such petition, the petitioner shall deliver to the sheriff of the county the property described in the petition to be dealt with as hereinafter provided in Section 89-17-17.

SOURCES: Codes, Hemingway's 1917, § 7305; 1930, § 6527; 1942, § 1011; Laws, 1908, ch. 120.

Cross References — General jurisdiction of circuit court, see § 9-7-81.
Lien for work done to or materials supplied for watercraft, see § 85-7-7.

JUDICIAL DECISIONS

1. In general.

Salvor has right to possession of vessel to enforce salvage claim only where such vessel is a derelict, and a vessel is not a derelict if the owner has not abandoned it but is in pursuit of it. Mengel Box Co. v. Joest, 127 Miss. 461, 90 So. 161 (1921).

RESEARCH REFERENCES

ALR. Time limits for salvage suits under 46 USCS § 730. 56 A.L.R. Fed. 542.

§ 89-17-11. Clerk to issue summons.

Upon filing such petition the clerk shall issue a summons to the defendant named as required by the Mississippi Rules of Civil Procedure. In case the owners of the property are unknown, then a notice shall be published as provided for by the Mississippi Rules of Civil Procedure.

SOURCES: Codes, Hemingway's 1917, § 7306; 1930, § 6528; 1942, § 1012; Laws, 1908, ch. 120; Laws, 1991, ch. 573, § 124, eff from and after July 1, 1991.

Cross References — Summons, see Miss. R. Civ. P. 4.

§ 89-17-13. How notice given where parties are nonresidents of state.

In suits against persons named in the petition, as defendants thereto, where such defendant is a nonresident of the state, or cannot be served with process, then notice shall be given to such defendant as is provided for in the Mississippi Rules of Civil Procedure.

SOURCES: Codes, Hemingway's 1917, § 7307; 1930, § 6529; 1942, § 1013; Laws, 1908, ch. 120; Laws, 1991, ch. 573, § 125, eff from and after July 1, 1991.

Cross References — Service of process, see Miss. R. Civ. P. 4.

§ 89-17-15. Procedure on return of writ; defendant to plead to petition in case of contest.

At the return of the process, in case the defendant shall contest the petitioner's right to compensation or salvage, or the amount thereof, the petition shall stand for a complaint and the defendant shall plead to it as if it were an ordinary action at law and the matter shall be tried as provided for in the Mississippi Rules of Civil Procedure.

SOURCES: Codes, Hemingway's 1917, § 7308; 1930, § 6530; 1942, § 1014; Laws, 1908, ch. 120; Laws, 1991, ch. 573, § 126, eff from and after July 1, 1991.

§ 89-17-17. Sheriff to advertise property for sale; proceeds held for result of suit.

Immediately upon the delivery to the sheriff of the property described in the petition as provided in Section 89-17-9, the sheriff shall at once advertise the property for sale in the same manner as provided by law for the advertisement and sale of personal property under execution, and on the day fixed shall sell the property for cash to the highest bidder, and shall hold the proceeds to abide the result of the suit or proceeding. But the defendant to the petition, or any person interposing a claim thereto, in cases against unknown owners, can at any time before the day of sale, execute a bond with two (2) or more sureties in double the value of the property, such valuation to be fixed by the sheriff conditioned to satisfy such judgment as the petitioner shall recover in the case, and upon the execution of such bond, to be approved by the sheriff, the property shall be delivered to the defendant or claimant.

SOURCES: Codes, Hemingway's 1917, § 7309; 1930, § 6531; 1942, § 1015; Laws, 1908, ch. 120.

§ 89-17-19. Failure of defendant to appear at return term; funds condemned to satisfy judgment.

In case the defendant shall not appear at the return term of the writ, or in cases against unknown owners, where no person or party interposes a claim, the court shall award the petitioner a judgment for the amount as appears to the court that petitioner is entitled to, and condemn the funds in the hands of the sheriff, or render judgment against the defendant or his bond as the case may be, for the satisfaction of the judgment so rendered and costs. In case there shall be a surplus remaining in the hands of the sheriff after satisfying the judgment and costs, it shall be paid to the clerk of the court, to be held by him subject to the claim of the owners of the property so sold, and shall be paid out to such owner, upon the order of the court, after satisfactory evidence is adduced, establishing in the judgment of the court such ownership. In all cases where the petitioner establishes his claim, and is awarded a judgment for the amount stated in the petition, the court shall allow the petitioner a reasonable attorney's fee for preparing the petition, which shall be taxed as part of the costs of the case.

SOURCES: Codes, Hemingway's 1917, § 7310; 1930, § 6532; 1942, § 1016; Laws, 1908, ch. 120.

RESEARCH REFERENCES

ALR. Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

§ 89-17-21. Jurisdiction of justice courts; time for trial; notice to parties.

Justice courts shall have jurisdiction of all cases provided for in this chapter, where the value of the property described in the petition does not exceed the amount provided in Section 9-11-9, and in all cases where the defendant is a nonresident, or is not served with process, the provisions of the section of the code in relation to attachments before justice court judges shall apply, and notice shall be given to the defendant, and the case tried as provided in that section of the code. When the case shall be one against unknown owners, the justice court judge shall fix the trial for a date not earlier than one (1) month from the beginning of the suit, and notices shall be posted for three (3) consecutive weeks in the county of the justice court judge, addressed to all persons having or claiming any interest in the property described in the petition, and describing the property in such notices, requiring them to appear before the justice court judge on the date fixed for trial to contest the claim of the petitioner, which notices shall be posted in the public places in the county likely to be seen, which shall be in lieu of a publication thereof in a newspaper.

SOURCES: Codes, Hemingway's 1917, § 7311; 1930, § 6533; 1942, § 1017; Laws, 1908, ch. 120; Laws, 1981, ch. 471, § 52; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Note — Section 60, ch. 471, Laws, 1981, as amended by § 28 of ch. 423, Laws, 1982, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984."

Cross References — Civil jurisdiction of justice courts, see § 9-11-9.

Notice, proceedings and trial in actions relating to attachments, see §§ 11-33-105, 11-33-107.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace §§ 24 et seq.

CJS. 51 C.J.S., Justices of the Peace §§ 26, 42 et seq.

§ 89-17-23. Person claiming property admitted to defend.

On the return of the summons before a justice of the peace, or on the day fixed for trial, in cases against nonresidents or parties not served with process, or in cases against unknown owners, the justice shall hear the cause. Any person making claim to the property described in the petition shall be admitted to defend as provided in Section 89-17-15 for cases in the circuit court, and the same mode of procedure shall be followed in the trial as is provided for the trial of civil actions before justices of the peace, under the general laws of the state, and judgment shall be rendered as hereinbefore provided in cases before the circuit court.

SOURCES: Codes, Hemingway's 1917, § 7312; 1930, § 6534; 1942, § 1018; Laws, 1908, ch. 120.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 89-17-25. Penalty for converting derelict property to own use.

If any person shall convert to his own use, sell or otherwise dispose of any saw log, sawn or hewn timber, lumber, boat, or other water craft, or other floatable thing of value not belonging to him, which may have come into his possession while floating as derelict, in any of the waters of the State of Mississippi, or which may theretofore have been sunken and raised or floated from such sunken condition by him or others, or which he or others may have found cast upon the shores of the Gulf of Mexico, or Mississippi Sound, in the State of Mississippi, or any bay, inlet, or bayou, emptying into same, or upon the shore of any other watercourse in the State of Mississippi, he shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than double the value of the property converted, sold or disposed of, or by imprisonment in the county jail for a term not exceeding six (6) months.

SOURCES: Codes, Hemingway's 1917, § 7313; 1930, § 6535; 1942, § 1019; Laws, 1908, ch. 120.

Cross References — Petty larceny, see § 97-17-53.
Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

RESEARCH REFERENCES

Am Jur. 52 Am. Jur. 2d, Logs and Timber § 93.

§ 89-17-27. Unlawful to purchase derelict property from finder thereof.

If any person shall purchase, or otherwise acquire, except at a sale as provided in this chapter, or by order of a court of competent jurisdiction, from any person other than the owner thereof, any property of the character or description, and in the condition enumerated in the foregoing section, such person shall be guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding double the value of the property so purchased, or acquired, or by imprisonment in the county jail for a term not exceeding six (6) months.

SOURCES: Codes, Hemingway's 1917, § 7314; 1930, § 6536; 1942, § 1020; Laws, 1908, ch. 120.

Cross References — Crime of receiving stolen goods, see § 97-17-70.
Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

CHAPTER 19

Mississippi Conservation Easements

SEC.
89-19-1. Short title.
89-19-3. Definitions.
89-19-5. General provisions relating to conservation easement; acceptance; recordation; duration.
89-19-7. Actions affecting easements.
89-19-9. Validity of easements not affected by certain conditions.
89-19-11. Capital improvements on property upon which easements have been granted.
89-19-13. Interests to which chapter applies; relation to other laws.
89-19-15. Recorded easements to be filed with Attorney General and Department of Wildlife, Fisheries, and Parks.

§ 89-19-1. Short title.

This chapter shall be known as the "Mississippi Conservation Easement Act of 1986."

SOURCES: Laws, 1986, ch. 404, § 1, eff from and after passage (approved March 27, 1986).

Comparable Laws from other States — Alabama Code, §§ 35-18-1 through 35-18-6.
Georgia Code Annotated, §§ 44-10-1 through 44-10-8.
North Carolina General Statutes, §§ 113A-230 et seq.
Tennessee Code Annotated, §§ 66-9-301 et seq.
Texas Natural Resources Code, §§ 183.001 through 183.005.
Virginia Code Annotated, §§ 10.1-1009 et seq.

§ 89-19-3. Definitions.

For purposes of this chapter, the following words shall have the meaning ascribed herein unless the context otherwise requires:

(1) "Conservation easement" shall mean a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, historical or open-space values of real property, assuring its availability for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air and water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property.

(2) "Holder" shall mean either:

(a) A governmental body empowered by the law of this state or the United States to hold an interest in real property; or

(b) A private, nonprofit, charitable or educational corporation, association or trust, the purposes or powers of which include retaining or protecting the natural, scenic, historical or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, educational or open-space use, protecting natural features and resources, maintaining or enhancing air or water quality or preserving the natural, historical, architectural, archaeological or cultural aspects of real property which is the recipient or grantee of a conservation easement.

(3) "Third-party right of enforcement" shall mean a right granted in a conservation easement to a governmental body or private, nonprofit charitable corporation, association or trust, which is not a holder but which is eligible to be a holder, to enforce any of the terms of the conservation easement.

(4) "Person" shall mean any natural person or legal entity.

SOURCES: Laws, 1986, ch. 404, § 2, eff from and after passage (approved March 27, 1986).

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Easements and licenses § 1.

§ 89-19-5. General provisions relating to conservation easement; acceptance; recordation; duration.

(1) Except as otherwise provided by this chapter, a conservation easement may be created, conveyed, recorded and assigned, in the same method and manner as other easements.

(2) No right or duty in favor of or against a holder and no right of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(3) Except as provided in subsection (2) of Section 89-19-7 of this chapter, a conservation easement is unlimited in its duration unless the instrument creating it otherwise provides.

(4) An interest in real property in existence at the time a conservation easement is created is not impaired by the conservation easement unless the owner of the interest is a party to the conservation easement or consents to it.

(5) A conservation easement shall continue to be effective and shall not be extinguished if the easement holder is or becomes the owner in fee of the subject property.

SOURCES: Laws, 1986, ch. 404, § 3; Laws, 1988, ch. 379, § 2, eff from and after passage (approved April 18, 1988).

Cross References — Requirement that conservation easements be filed with the Attorney General and the Department of Wildlife, Fisheries and Parks, see § 89-19-15.

RESEARCH REFERENCES

ALR. Conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement. 89 A.L.R.3d 767.

"Compliance with state standards" as requirement to granting right-of-way over federal public lands under § 505(a)(iv) of the Federal Land Policy and Management Act of 1976 (43 USCS § 1765(a)(iv)). 60 A.L.R. Fed. 386.

Am Jur. 25 Am. Jur. 2d, Easements and licenses §§ 11-122.

22 Am. Jur. Trials, Condemnation of Easements §§ 1 et seq.

3 Am. Jur. Proof of Facts 2d, Abandonment of easement §§ 1-16.

5 Am. Jur. Proof of Facts 2d, Intent to create negative easement §§ 1-14.

28 Am. Jur. Proof of Facts 2d, Permissive possession or use of land §§ 1-16.

33 Am. Jur. Proof of Facts 2d, Extent of easement over servient estate §§ 1-31.

CJS. 28A C.J.S., Easements §§ 4-89.

§ 89-19-7. Actions affecting easements.

(1) Any action to enforce a conservation easement may be brought by:

(a) An owner of an interest in the real property burdened by the easement;

(b) A holder of the easement;

(c) A person having a third-party right of enforcement;

(d) The Attorney General of the State of Mississippi;

(e) The Mississippi Department of Wildlife, Fisheries and Parks; or

(f) A person otherwise authorized and empowered by law.

(2) This chapter does not, and shall not be construed to, affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity. In such proceeding, the holder of the conservation easement shall be compensated for the value of the easement.

SOURCES: Laws, 1986, ch. 404, § 4; Laws, 1988, ch. 379, § 3; Laws, 2000, ch. 516, § 132, eff from and after passage (approved Apr. 30, 2000).

Cross References — Transfer of functions of Department of Wildlife Conservation to Department of Wildlife, Fisheries and Parks, see § 49-1-4.

Provision that, except as provided in subsection (2) of this section, a conservation easement is of unlimited duration unless the instrument creating it otherwise provides, see § 89-19-5.

RESEARCH REFERENCES

ALR. Conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement. 89 A.L.R.3d 767.

"Compliance with state standards" as requirement to granting right-of-way over federal public lands under § 505(a)(iv) of the Federal Land Policy and Management Act of 1976 (43 USCS § 1765(a)(iv)). 60 A.L.R. Fed. 386.

Am Jur. 25 Am. Jur. 2d, Easements and licenses §§ 99-105.

22 Am. Jur. Trials, Condemnation of Easements §§ 1 et seq.

3 Am. Jur. Proof of Facts 2d, Abandonment of easement §§ 1-16.

5 Am. Jur. Proof of Facts 2d, Intent to create negative easement §§ 17-14.

28 Am. Jur. Proof of Facts 2d, Permissive possession or use of land §§ 1-16.

33 Am. Jur. Proof of Facts 2d, Extent of easement over servient estate §§ 1-31.

CJS. 28A C.J.S., Easements §§ 77, 78, 90-92, 117-137.

§ 89-19-9. Validity of easements not affected by certain conditions.

A conservation easement shall be valid despite the following:

(a) It is not appurtenant to an interest in real property;

(b) It may be or has been assigned to another holder;

(c) It is not of a character that has been traditionally recognized at common law;

(d) It imposes a negative burden;

(e) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(f) The benefit does not touch or concern real property; or

(g) There is no privity of estate or contract.

SOURCES: Laws, 1986, ch. 404, § 5, eff from and after passage (approved March 27, 1986).

RESEARCH REFERENCES

ALR. Conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement. 89 A.L.R.3d 767.

"Compliance with state standards" as requirement to granting right-of-way over federal public lands under § 505(a)(iv) of the Federal Land Policy and Management Act of 1976 (43 USCS § 1765(a)(iv)). 60 A.L.R. Fed. 386.

Am Jur. 25 Am. Jur. 2d, Easements and licenses §§ 11 et seq.

22 Am. Jur. Trials, Condemnation of Easements §§ 1 et seq.

3 Am. Jur. Proof of Facts 2d, Abandonment of easement §§ 1-16.

5 Am. Jur. Proof of Facts 2d, Intent to create negative easement §§ 1-14.

28 Am. Jur. Proof of Facts 2d, Permissive possession or use of land §§ 1-16.

33 Am. Jur. Proof of Facts 2d, Extent of easement over servient estate §§ 1-31.

CJS. 28A C.J.S., Easements §§ 4, 11 et seq.

§ 89-19-11. Capital improvements on property upon which easements have been granted.

With the exception of "Mississippi Landmarks," as defined by the Antiquities Law of Mississippi (Section 39-7-1 et seq., Mississippi Code of 1972) and of properties entered in the National Register of Historic Places, no public money, derived either from a special fund or the General Fund, shall be expended for capital improvements on any real property upon which a conservation easement has been granted unless the conservation easement is perpetual, a governmental body is the holder of the easement and the capital improvements are solely for the use and benefit of such holder.

SOURCES: Laws, 1986, ch. 404, § 6, eff from and after passage (approved March 27, 1986).

§ 89-19-13. Interests to which chapter applies; relation to other laws.

(1) This chapter shall apply to an interest created after March 27, 1986, whether the interest is designated as a conservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, as long as such interest complies with the provisions of this chapter.

(2) This chapter shall apply to any interest created prior to March 27, 1986, if the interest would have been enforceable had it been created after March 27, 1986, unless retroactive application would contravene the Constitution or laws of this state or the United States.

(3) This chapter shall not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, that is enforceable under any other law of this state.

(4) The provisions of this chapter are cumulative and supplemental to any other provision of law.

SOURCES: Laws, 1986, ch. 404, § 7, eff from and after passage (approved March 27, 1986).

§ 89-19-15. Recorded easements to be filed with Attorney General and Department of Wildlife, Fisheries, and Parks.

Whenever any instrument conveying a conservation easement is recorded after April 18, 1988, the clerk of the court recording it shall mail certified copies thereof, together with notice as to the date and place of recordation, to the Attorney General of the State of Mississippi and the Mississippi Department of Wildlife, Fisheries and Parks. The requirement that certified copies be mailed to the Attorney General and the Mississippi Department of Wildlife, Fisheries and Parks shall be stated in any instrument which conveys a conservation easement after April 18, 1988. The holder of any conservation easement created prior to the date hereof wishing to qualify such easement for the benefits provided under this chapter shall provide to the Attorney General and the Mississippi Department of Wildlife, Fisheries and Parks, within one (1) year after April 18, 1988, a certified copy of the instrument creating such easement, indicating the date and place of the recordation.

SOURCES: Laws, 1988, ch. 379, § 1; Laws, 2000, ch. 516, § 133, eff from and after passage (approved Apr. 30, 2000).

CHAPTER 21

Uniform Disclaimer of Property Interests Act

Sec.
89-21-1. Short title.
89-21-3. Right to disclaim interest in property.
89-21-5. Time of disclaimer.
89-21-7. Form of disclaimer.
89-21-9. Effect of disclaimer.
89-21-11. Waiver and bar.
89-21-13. Remedy not exclusive.
89-21-15. Application.
89-21-17. Uniformity of application and construction.

§ 89-21-1. Short title.

This chapter may be cited as the "Uniform Disclaimer of Property Interests Act."

SOURCES: Laws, 1994, ch. 618, § 9, eff from and after July 1, 1994.

Comparable Laws from other States — Alabama: Code of Ala. § 43-8-290 et seq.
Arizona: A.R.S. § 14-10001 et seq.
Arkansas: A.C.A. § 28-2-201 et seq.
Florida: Fla. Stat. § 739.101 et seq.
Hawaii: HRS § 526-1 et seq.
Indiana: Burns Ind. Code Ann. § 32-17.5-1-1 et seq.
Iowa: Iowa Code § 633E.1 et seq.
Maryland: Md. ESTATES AND TRUSTS Code Ann. § 9-201 et seq.
New Hampshire: RSA 563-B:1 et seq.
New Mexico: N.M. Stat. Ann. § 46-10-1 et seq.
Vermont: 14 V.S.A. § 1951 et seq.
Virginia: Va. Code Ann. § 64.1-196.1 et seq.
West Virginia: W. Va. Code § 42-6-1 et seq.

§ 89-21-3. Right to disclaim interest in property.

A person, or the representative of a person, to whom an interest in or with respect to property or an interest therein devolves by whatever means may disclaim it in whole or in part by delivering or filing a written disclaimer under this chapter. The right to disclaim exists notwithstanding (a) any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction or (b) any restriction or limitation on the right to disclaim contained in the governing instrument. For purposes of this section, the "representative of a person" includes an executor of a decedent's estate, an administrator of a decedent's estate, a conservator of a disabled person, a guardian of a minor or incapacitated person, and an agent acting on behalf of the person within the authority of a power of attorney. For purposes of this section, the term "governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan or instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive or nominative instrument of any similar type.

SOURCES: Laws, 1994, ch. 618, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Appointee's renunciation of appointment. 9 A.L.R.2d 1382.

Beneficiary's right to disclaim or renounce spendthrift trust prior to acceptance. 14 A.L.R.3d 1437.

Creditor's right to prevent debtor's renunciation of benefit under will or debtor's election to take under will. 39 A.L.R.4th 633.

Am Jur. 23 Am. Jur. 2d, Descent and Distribution §§ 157, 158.

62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 204, 205.

76 Am. Jur. 2d, Trusts §§ 98, 142.

80 Am. Jur. 2d, Wills §§ 1359, 1363.

§ 89-21-5. Time of disclaimer.

(1) The following rules govern the time when a disclaimer must be filed or delivered:

(a) If the property or interest has devolved to the disclaimant under a testamentary instrument or by the laws of intestacy, the disclaimer must be filed, if of a present interest, not later than nine (9) months after the death of the deceased owner or deceased donee of a power of appointment and, if of a future interest, not later than nine (9) months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested. The disclaimer must be filed in the chancery court of the county in which proceedings for the administration of the estate of the deceased owner or deceased donee of the power have been commenced. A copy of the disclaimer must be delivered in person or mailed by registered or certified mail, return receipt requested, to the executor of the decedent's estate, the administrator of the decedent's estate, or any other fiduciary of the decedent or donee of the power.

(b) If a property or interest has devolved to the disclaimant under a nontestamentary instrument or contract, the disclaimer must be delivered or filed and also, if real property or an interest therein is disclaimed, a copy of the disclaimer must be recorded in the office of the chancery clerk of the county in which the property, or interest disclaimed, is located if a present interest, not later than nine (9) months after the effective date of the nontestamentary instrument or contract and, if of a future interest, not later than nine (9) months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested. If the person entitled to disclaim does not know of the existence of the interest, the disclaimer must be delivered or filed and also, if real property or an interest therein is disclaimed, a copy of the disclaimer must be recorded in the office of the chancery clerk of the county in which the property or interest disclaimed is located, if a present interest, not later than nine (9) months after the person learns of the existence of the interest. The effective date of a revocable instrument or contract is the date on which the maker no longer has power to revoke it or to transfer to himself or another the entire legal and equitable ownership of the interest. The disclaimer or a copy thereof must be delivered in person or mailed by registered or certified mail, return receipt requested, to the person who has legal title to or possession of the interest disclaimed.

(2) A surviving joint tenant (or tenant by the entireties) may disclaim as a separate interest any property or interest therein devolving to him by right of survivorship. A surviving joint tenant (or tenant by the entireties) may disclaim the entire interest in any property or interest therein that is the subject of a joint tenancy (or tenancy by the entireties) devolving to him, if the joint tenancy (or tenant by the entireties) was created by act of a deceased joint tenant (or tenant by the entireties), and the survivor did not join in creating the joint tenancy (or tenancy by the entireties), and has not accepted a benefit under it.

(3) If real property or an interest therein is disclaimed under subsection (1), a copy of the disclaimer may be recorded in the office of the chancery clerk of the county in which the property or interest disclaimed is located.

SOURCES: Laws, 1994, ch. 618, § 2, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. 2d, Descent and Distribution §§ 157, 158.

§ 89-21-7. Form of disclaimer.

The disclaimer must (a) describe the property or interest disclaimed, (b) declare the disclaimer and extent thereof, and (c) be signed by the disclaimant.

SOURCES: Laws, 1994, ch. 618, § 3, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. 2d, Descent and Distribution §§ 157, 158.

62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 207, 208.

76 Am. Jur. 2d, Trusts §§ 98, 142.

80 Am. Jur. 2d, Wills § 1367.

§ 89-21-9. Effect of disclaimer.

(1) The effects of a disclaimer are:

(a) If property or an interest therein devolves to a disclaimant under a testamentary instrument, under a power of appointment exercised by a testamentary instrument, or under the laws of intestacy, and the decedent has not provided for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would take the disclaimant's share by representation were the disclaimant to predecease the decedent, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the decedent. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent. A disclaimer relates back for all purposes to the date of death of the decedent.

(b) If property or an interest therein devolves to a disclaimant under a nontestamentary instrument or contract and the instrument or contract does not provide for another disposition of that interest, should it be disclaimed, or of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the effective date of the instrument or contract, but if by law or under the nontestamentary instrument or contract the descendants of the disclaimant would take the disclaimant's share by representation were the disclaimant to predecease the effective date of the instrument, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the effective date of the instrument. A disclaimer relates back for all purposes to that date. A future interest that takes effect in possession or enjoyment at or after the termination of the disclaimed interest takes effect as if the disclaimant had died before the effective date of the instrument or contract that transferred the disclaimed interest.

(2) The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under either of them.

SOURCES: Laws, 1994, ch. 618, § 4, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Appointee's renunciation of appointment. 9 A.L.R.2d 1382.

Beneficiary's right to disclaim or renounce spendthrift trust prior to acceptance. 14 A.L.R.3d 1437.

Creditor's right to prevent debtor's renunciation of benefit under will or debtor's election to take under will. 39 A.L.R.4th 633.

Am Jur. 23 Am. Jur. 2d, Descent and Distribution §§ 157, 158.

62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 209, 210.

76 Am. Jur. 2d, Trusts §§ 98, 142.

80 Am. Jur. 2d, Wills § 1368.

§ 89-21-11. Waiver and bar.

The right to disclaim property or an interest therein is barred by (a) an assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor, (b) a written waiver of the right to disclaim, (c) an acceptance of the property or interest or a benefit under it, or (d) a sale of the property or interest under judicial sale made before the disclaimer is made.

SOURCES: Laws, 1994, ch. 618, § 5, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 23 Am. Jur. 2d, Descent and Distribution §§ 157, 158.

62 Am. Jur. 2d, Powers of Appointment and Alienation §§ 207, 208.

76 Am. Jur. 2d, Trusts §§ 98, 142.

80 Am. Jur. 2d, Wills § 1367.

§ 89-21-13. Remedy not exclusive.

This chapter does not abridge the right of person to waive, release, disclaim, or renounce property or an interest therein under any other statute.

SOURCES: Laws, 1994, ch. 618, § 6, eff from and after July 1, 1994.

§ 89-21-15. Application.

An interest in property that exists on July 1, 1994, as to which, if a present interest, the time for filing a disclaimer under this chapter has not expired or, if a future interest, the interest has not become indefeasibly vested or the taker finally ascertained, may be disclaimed within nine (9) months after July 1, 1994.

SOURCES: Laws, 1994, ch. 618, § 7, eff from and after July 1, 1994.

§ 89-21-17. Uniformity of application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

SOURCES: Laws, 1994, ch. 618, § 8, eff from and after July 1, 1994.

CHAPTER 23

Mississippi Uniform Environmental Covenants Act

Sec.
89-23-1. Short title.
89-23-3. Definitions.
89-23-5. Holder defined; rights and obligations; subordination of rights.
89-23-7. Contents of environmental covenant.
89-23-9. Validity of environmental covenant; effect on other instruments.
89-23-11. Relation of this chapter to other land-use laws.
89-23-13. Notice requirement; penalty for failure to provide notice.
89-23-15. Recording of environmental covenant, amendment, and termination.
89-23-17. Duration of environmental covenants.
89-23-19. Amendment or termination of environmental covenant; consent.
89-23-21. Violation of environmental covenant; injunctive relief.
89-23-23. Application and construction of chapter.
89-23-25. Relation of chapter to federal law.
89-23-27. Severability.

§ 89-23-1. Short title.

This chapter may be cited as the Mississippi Uniform Environmental Covenants Act.

SOURCES: Laws, 2008, ch. 398, § 1, eff from and after July 1, 2008.

Comparable Laws from other States — Alabama: Code of Ala. § 35-19-1 et seq.
Hawaii: HRS § 508C-1 et seq.
Illinois: 765 ILCS 122/1 et seq.
Iowa: Iowa Code § 455I.1 et seq.
Maine: 38 M.R.S. § 3001 et seq.
Maryland: Md. ENVIRONMENT Code Ann. § 1-801 et seq.
Minnesota: Minn. Stat. § 114E.01 et seq.
Nebraska: R.R.S. Neb. § 76-2601 et seq.
Oklahoma: 60 Okl. St. § 49.11 et seq.
South Dakota: S.D. Codified Laws § 34A-17-1 et seq.
Utah : Utah Code Ann. § 57-25-101 et seq.
Virginia: Va. Code Ann. § 10.1-1238 et seq.
Washington: Rev. Code Wash. (ARCW) § 64.70.005 et seq.
West Virginia: W. Va. Code § 22-22B-1 et seq.

§ 89-23-3. Definitions.

In this chapter:

(1) "Activity and use limitations" means restrictions or obligations created under this chapter with respect to real property.

(2) "Agency" means the Mississippi Department of Environmental Quality or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(2A) "Commission" means the Mississippi Commission on Environmental Quality.

(3) "Common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

(A) Under a federal or state program governing environmental remediation of real property, including:

(i) Subchapter III or IX of the federal Resource Conservation and Recovery Act of 1976, 42 USC Sections 6921 through 6939e and 6991 through 6991i;

(ii) Section 7002 or 7003 of the federal Resource Conservation and Recovery Act of 1976, 42 USC Sections 6972 and 6973;

(iii) The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC Sections 9601 through 9647, as amended;

(iv) The Mississippi Air and Water Pollution Control Law, Section 49-17-1 et seq.;

(v) The Mississippi Solid Wastes Disposal Law of 1974, Section 17-17-1 et seq.;

(vi) The Mississippi Underground Storage Tank Act of 1988, Section 49-17-401 et seq.;

(vii) Such other laws or regulations as the commission shall enumerate.

(B) Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(C) Under a state voluntary clean-up program authorized in the Mississippi Brownfields Voluntary Cleanup and Redevelopment Act, Section 49-35-1 et seq.

(6) "Holder" means the grantee of an environmental covenant as specified in Section 89-23-5(a).

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "Record," used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(10) "Servitude" means a covenant, profit, easement in gross, or easement appurtenant.

SOURCES: Laws, 2008, ch. 398, § 2, eff from and after July 1, 2008.

Cross References — Mississippi Department of Environmental Quality generally, see §§ 49-2-1 et seq.

Commission on Environmental Quality, generally, see § 49-2-5.

§ 89-23-5. Holder defined; rights and obligations; subordination of rights.

(a) Any person, including a person that owns an interest in the real property, a municipality or other unit of local government, may be a holder. An environmental covenant may identify more than one (1) holder. The interest of a holder is an interest in real property.

(b) A right of an agency under this chapter or under an environmental covenant is not an interest in real property. Nothing in this chapter authorizes the commission to act as a holder.

(c) An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing or approving an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this chapter except as provided in the covenant.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant.

(2) This chapter does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

SOURCES: Laws, 2008, ch. 398, § 3, eff from and after July 1, 2008.

§ 89-23-7. Contents of environmental covenant.

(a) An environmental covenant must:

(1) State that the instrument is an environmental covenant executed pursuant to this chapter;

(2) Contain a legally sufficient description of the real property subject to the covenant;

(3) Describe the activity and use limitations on the real property;

(4) Identify every holder;

(5) Be signed by the agency, every holder, and unless waived by the agency, every owner of the fee simple of the real property subject to the covenant;

(6) Be signed by the commission, unless the commission waives participation; and

(7) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a), an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:

(1) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(2) Requirements for periodic reporting describing compliance with the covenant;

(3) Rights of access to the property granted in connection with implementation or enforcement of the covenant;

(4) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(5) Limitation on amendment or termination of the covenant in addition to those contained in Sections 89-23-17 and 89-23-19; and

(6) Rights of the holder in addition to its right to enforce the covenant pursuant to Section 89-23-21.

(c) In addition to other conditions for its approval of an environmental covenant, the agency or the commission may require those persons specified by the agency or commission who have interests in the real property to sign the covenant.

(d) If the commission refuses to sign an environmental covenant, it shall set forth its reasons for refusing to sign in an order and such order may be appealed as provided in Section 49-17-41.

SOURCES: Laws, 2008, ch. 398, § 4, eff from and after July 1, 2008.

§ 89-23-9. Validity of environmental covenant; effect on other instruments.

(a) An environmental covenant that complies with this chapter runs with the land.

(b) An environmental covenant that is otherwise effective is valid and enforceable even if:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to a person other than the original holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) The benefit or burden does not touch or concern real property;

(7) There is no privity of estate or contract;

(8) The holder dies, ceases to exist, resigns, or is replaced; or

(9) The owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before July 1, 2008, is not invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) or because it was identified as an easement, servitude, deed restriction, or other interest. This chapter does not apply in any other respect to such an instrument.

(d) This chapter does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

SOURCES: Laws, 2008, ch. 398, § 5, eff from and after July 1, 2008.

§ 89-23-11. Relation of this chapter to other land-use laws.

This chapter does not authorize a use of real property that is otherwise prohibited by zoning, by law other than this chapter regulating use of real property, or by a recorded instrument that has priority over the environmental covenant.

An environmental covenant may prohibit or restrict uses of real property which are authorized by zoning or by law other than this chapter.

SOURCES: Laws, 2008, ch. 398, § 6, eff from and after July 1, 2008.

§ 89-23-13. Notice requirement; penalty for failure to provide notice.

(a) A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:

(1) Each person that signed the covenant;

(2) Each person holding a recorded interest in the real property subject to the covenant;

(3) Each person in possession of the real property subject to the covenant;

(4) Each municipality or other unit of local government in which real property subject to the covenant is located; and

(5) Any other person the agency requires.

(b) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.

(c) Failure by any person to provide a copy of the covenant in the manner required by the agency shall be punishable by a civil penalty to be determined by the Commission on Environmental Quality consistent with the terms and provisions of Section 49-17-43.

SOURCES: Laws, 2008, ch. 398, § 7, eff from and after July 1, 2008.

§ 89-23-15. Recording of environmental covenant, amendment, and termination.

(a) An environmental covenant and any amendment or termination of the covenant must be recorded in every county in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in Section 89-23-17(b), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property including, but not limited to, the requirement of providing indexing instructions and preparer data, as set forth in Section 89-5-33(3); and, the requirement to provide an acknowledgment as set forth in Section 89-3-1.

SOURCES: Laws, 2008, ch. 398, § 8, eff from and after July 1, 2008.

§ 89-23-17. Duration of environmental covenants.

(a) An environmental covenant is perpetual unless it is:

(1) By its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) Terminated by consent pursuant to Section 89-23-19;

(3) Terminated by foreclosure of an interest that has priority over the environmental covenant;

(4) Terminated or modified in an eminent domain proceeding, but only if:

(A) The commission and the agency that signed the covenant are parties to the proceeding;

(B) All persons identified in Section 89-23-19(a) and (b) are given notice of the pendency of the proceeding; and

(C) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment; or

(5) Terminated or modified by the commission pursuant to the following:

(A) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, the commission, by an order in which all persons identified in Section

89-23-19(a) and (b) have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant.

(B) The commission's order shall be subject to review as provided in Section 49-17-41. Failure by the commission to make a determination within one hundred twenty (120) days of a request to terminate the covenant or reduce its burden on the real property subject to the covenant shall be deemed a decision that the environmental covenant should not be terminated or modified and parties listed in Section 89-23-21 may request a hearing before the commission in accordance with Section 49-17-41.

(b) Except as otherwise provided in subsection (a), an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

SOURCES: Laws, 2008, ch. 398, § 9, eff from and after July 1, 2008.

Cross References — Right of eminent domain, generally, see §§ 11-27-1 et seq.
Commission on Environmental Quality generally, see § 49-2-5.

§ 89-23-19. Amendment or termination of environmental covenant; consent.

(a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) The agency;

(2) Unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant;

(3) The commission, unless it waives its participation;

(4) Each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(5) Except as otherwise provided in subsection (d)(2), the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) A holder may not assign its interest without consent of the other parties;

(2) A holder may be removed and replaced by agreement of the other parties specified in subsection (a); and

(e) A court of competent jurisdiction may fill a vacancy in the position of holder.

SOURCES: Laws, 2008, ch. 398, § 10, eff from and after July 1, 2008.

Cross References — Commission on Environmental Quality generally, see § 49-2-5.

Recording of environmental covenant, amendments to covenant and termination of covenant required, see § 89-23-15.

§ 89-23-21. Violation of environmental covenant; injunctive relief.

(a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(1) A party to the covenant;

(2) The agency;

(3) The commission;

(4) Any person to whom the covenant expressly grants power to enforce;

(5) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(6) A municipality or other unit of local government in which the real property subject to the covenant is located.

(b) This chapter does not limit the regulatory authority of the agency or the Mississippi Commission on Environmental Quality under law other than this chapter with respect to an environmental response project.

(c) A person is not responsible for or subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant.

SOURCES: Laws, 2008, ch. 398, § 11, eff from and after July 1, 2008.

Cross References — Commission on Environmental Quality, generally, see § 49-2-5.

§ 89-23-23. Application and construction of chapter.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SOURCES: Laws, 2008, ch. 398, § 12, eff from and after July 1, 2008.

§ 89-23-25. Relation of chapter to federal law.

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 USCS Section 7001 et seq.) but does not modify, limit, or supersede Section 101 of that act (15 USCS Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of that act (15 USCS Section 7003(b)).

SOURCES: Laws, 2008, ch. 398, § 13, eff from and after July 1, 2008.

§ 89-23-27. Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SOURCES: Laws, 2008, ch. 398, § 14, eff from and after July 1, 2008.

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